No. _____

# IN THE
# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

INDUSTRIAS MARATHON LTDA.,

*Petitioner,*

V.

UNITED STATES OF AMERICA
and
MANUFACTURERS HANOVER TRUST COMPANY,

*Respondents.*

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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# APPENDIX A

Reported at: 801 F. Supp 984
(E.D.N.Y. 1992)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA<br><br>-against-<br><br>ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE,FENNER & SMITH, ET AL.,<br><br>Defendants. | MEMORANDUM AND ORDER<br>CV-902510 |

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WEINSTEIN, J.:

This case reveals the sophisticated financial operations of an international criminal syndicate. It involves more than ten million dollars in wire transfers and deposited funds seized by the government

as the traceable proceeds of illegal money-laundering and narcotics transactions. The moneys were alleged by the government to be subject to forfeiture under 21 U.S.C §881 et seq (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). Claimants had the burden at trial of proving either that each amount was not traceable to drug sales or that the claimants were unaware of the taint. After a two-month trial, the jury found that eighteen of the twenty-two amounts seized were forfeitable. For three amounts claimed by two claimants the jury determined that the funds were not the traceable proceeds of illegal money-laundering and narcotics transactions, and for one amount the jury found that the claimant was an innocent owner.

Claimants who received an adverse jury decision move for judgment notwithstanding the verdict or for a new trial; those motions are denied. Their motions to stay execution of the judgment during the appeal without posting a supersedeas bond are granted. Claimants supported by the jury verdict move to release the res; that motion is granted. The government moves to stay payment of proceeds to two claimants on the ground that they are represented by a fugitive; that motion -- perhaps the most interesting in the case -- is denied.

I. FACTS

Most of the funds seized and forfeited are the proceeds of a well-organized multinational organization based in the city of Cali, Colombia and

led by a fugitive named Jose Santa Cruz Londono. Londono and others conducted extensive narcotics trafficking and money-laundering activities involving hundreds of millions of dollars and thousands of kilograms of cocaine smuggled into the United States.

The Londono organization utilized many sophisticated strategies to launder narcotics proceeds. Electronic funds transfers from companies nominally in the clothing manufacturing or import-export business moved currency internationally; cars filled with cocaine were driven from Florida to New York, where the drugs were exchanged for cash and driven back to Florida (with the money at times smelling so strongly of drugs and drug-processing ingredients that it had to be literally washed

before it could be counted); shell corporations in Panama and Colombia electronically transferred money to Europe and elsewhere; huge amounts of cash were flown by plane to Panama, unloaded, and deposited in banks accustomed to such practices; drug dollars were exchanged on the black market in Colombia for Colombian pesos; shipments of manufactured goods from Colombia to Panama were "lost" to cover up dollar transfers; "loans" were made and paid the same day; and many other procedures were used to disguise the true source and nature of the funds.

Extensive corporate and banking records from all over the world were the primary basis for the government's case. Claimants used corporate records, letters rogatory, testimony of those

with knowledge of claimants' activities, and still and video pictures purporting to show the operations of their manufacturing plants in Colombia.

The Chief of the Drug Enforcement Administration Financial Intelligence Group, Cheryl Holmes, testified at trial after reviewing the voluminous bank and corporate records seized. She traced the links between numerous Panamanian shell corporations, which sent and received electronic funds transfers, and the Londono enterprise. Certified Public Accountant Aram Kostoglian, another government witness, testified that the cash receipts, corporate records, and bank statements of the claimant corporations were inconsistent with the types of records held by legitimate companies in Colombia and

elsewhere. Several former Londono associates who had pled guilty also testified at trial to the illegal nature of the various enterprises utilized by claimants; one, who dealt in gold as a cover-up, described the counting and re-packaging of huge stacks of United States currency.

In connection with the money-laundering scheme, substantial sums of money were electronically transferred into and out of bank accounts in many countries including the United States. See generally Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992) (describing the wire transfers). Officials of several European countries began cooperating in 1989 investigating

the suspected drug-money-laundering activities of Jose Santa Cruz Londono. The inquiry began in Luxembourg and culminated in the seizure of funds in New York and abroad during the summer of 1990.

In September 1989, using a wiretap the Luxembourg Surété Publique intercepted a telephone call between Londono in Colombia and Jose Franklin Jurado-Rodriguez, a Londono associate, in Luxembourg. Jurado reported to Londono that he had successfully opened bank accounts using the name of Londono's father-in-law, and that he planned to set up several shell companies to assist in the money-laundering enterprises. The Surété learned through wiretaps and faxtaps that another Londono associate, Edgar

Alberto Garcia-Montilla, was opening bank accounts throughout Europe in the names of Londono's parents-in-law, Heriberto Castro-Mesa and Esperanza Rodriguez de Castro.

In June 1990, Jurado, Garcia, and a third associate Ricardo Mahecha-Bustos, were observed by European law enforcement officers during a ten-day period traveling and depositing large sums of money in accounts in Italy, Luxembourg, Belgium, Denmark, Sweden, Germany, and the Netherlands. They were arrested when they returned to Luxembourg on money-laundering charges after a lengthy trial.

Heavy wire transfer activity followed the three arrests. Using memoranda and bank records seized at the time of the arrests, officials from

several countries were able to identify bank accounts around the world connected to the complex drug money-laundering scheme. In July and August 1990 approximately thirty million dollars was seized in Europe and sixteen million dollars was seized in Panama. In the United States, several American banks having correspondent banking relationships with Panamanian and Colombian banks were instructed by the United States Attorney to seize certain funds on deposit and wire transfers. The seized funds, totaling over ten million dollars, were the subject of this All Funds action.

Pursuant to a succession of amended complaints and supplemental warrants the banks were ordered by the United States Attorney to attach the identified

accounts and wire transfers and pay the money into court pending the outcome of a plenary trial. In a separate action by claimants against the banks which seized the funds, summary judgment was granted for the defendant banks. See Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). Another related action, by claimants against the United States Attorneys who ordered the banks to seize the funds, was dismissed for failure to state a claim. Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision).

Testimony at trial revealed an officially sanctioned parallel unofficial street market in dollars in Colombia. There was testimony that it

is common knowledge in the streets and board rooms of Colombia that the source of the millions of American dollars in circulation in this "black" market is largely the drug trade in New York and other American cities.

II. LAW

As the "drug was" has escalated, the number of forfeiture cases in the United States has burgeoned. Taking away the profits of drug crimes through forfeiture is a powerful weapon to cripple drug-trading enterprises. Unfairly wielded it can place commercial enterprises at a terrible disadvantage. It skirts the edge of due process. See, e.g., United States v. $8,850 in United States Currency, 461 U.S. 555, 565-66 (1983)

(balancing test set out in speedy trial context in Barker v. Wingo, 407 U.S. 514, 530 (1972), applies to determine reasonableness of delay in forfeiture proceedings). Even when a claimant is successful in fending off ultimate forfeiture, the loss of use of the seized funds for months or years while the case drags on can cripple a business. See id. at 565 ("Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden."). The substantive law, procedures, and allocation of burdens of proof in forfeiture cases differ markedly from other civil proceedings, and give the United States prosecutor a substantial edge. See generally Edward M. Genson & Mark W. Martin, A Guide to

Handling Federal Narcotics Forfeiture Cases, 79 Ill. B.J. 180 (1991) (discussing forfeiture procedures).

The government brought these proceedings under 21 U.S.C. § 881(a)(6), which provides for the forfeiture of

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . [and] all proceeds traceable to such and exchange . . .

The procedures applied in civil forfeiture proceedings are those "law[s] relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs law." 21 U.S.C. § 881(d); United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984).

Burdens of proof are allocated by 19 U.S.C. § 1615. Under that section, the burden of proof is on the claimant, "[p]rovided that probable cause shall be first shown for the institution of such suit or action, to be judged . . . by the court." To begin forfeiture proceedings the government must first demonstrate that there was probable cause to institute the action. It must demonstrate that there are "reasonable grounds" to believe that the property is subject to forfeiture. United States v. Banco Cafetero Panama, 197 F.2d 1154, 1160 (2d Cir. 1986). "These grounds must rise above the level of mere suspicion but need not amount to . . . 'prima facie proof.'" Id.

The reasonable ground standard is less stringent than the preponderance of

the evidence standard. United States v. 303 W 116th Street, N.Y., N.Y., 901 F.2d 288, 291 (2d Cir 1990). The government need not link the funds to a particular narcotics transaction, but rather must "connect the property with narcotics activity . . . ." Banco Cafetero, 797 F.2d at 1160. In satisfying its burden, the government may demonstrate probable cause that the property itself, apart from the actions of the owner, is connected to narcotics activity. See id.; see also United States v. One 1978 Chrysler LeBaron, 531 F. Supp. 32, 34 (E.D.N.Y. 1981) (innocence of owner does not by itself prevent forfeiture). This reflects the legal fiction that the object itself is the wrongdoer. Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al.

(Consolidated Bank Cases), __ F. Supp. __, 1992 WL 9212 (E.D.N.Y. 1992); United States v. One Mercedes-Benz 380 SEL VIN # WDBCA 33A1BB10331, 604 F. Supp. 1307, 1312 (S>D.N.Y. 1984) ("the vehicle itself is guilty of facilitating crime"), aff'd 762 F.2d 991 (2d Cir. 1985).

Probable cause is "judged . . . by the court." 19 U.S.C. § 1615; United States v. Sixteen Cases of Silk Ribbons, 27 F. Cas. 1099 (D.C.N.Y. 1870) (question of whether probable cause shown so as to shift burden to claimants is a question for the court); Three Thousand One Hundred and Nine Cases of Champagne, 23 F. Cas. 1168 (D.C.N.Y. 1867) (same). Hearsay is admissible to support the finding of probable cause. United States v. 4492 S. Livonia Road,

Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989) (hearsay proper, since holding otherwise would undermine Congress's intentional shifting of the burdens in forfeiture cases). As the Second Circuit has explained:

> In view of the unusual relative burdens of proof in civil forfeiture proceedings, this court, as well as a number of other circuits, has recognized an exception to the requirements of Rule 56(e) that supporting and opposing affidavits be based upon personal knowledge and admissible evidence, allowing the government to establish probable cause on the basis of hearsay affidavits.

United States v. 15 Black Ledge Drive, Marlborough, Ct., 897 F.2d 97, 101 (2d Cir. 1990). Circumstantial evidence may be relied upon to show probable cause. United States v. $2,500 in United States Currency, 689 F.2d 10, 16 (2d Cir. 1982), cert. denied sub nom. Aponte v.

United States, 465 U.S. 1099 (1984).

In the instant case, first a magistrate judge and then a district judge de novo determined that the government had probable cause to believe the funds were forfeitable. The district court's hearing on probable cause required three trial days in 1991. Post-hearing motions to reconsider the probable cause issue were denied. See United States v. All Funds et al., __ F. Supp. __, 1992 WL 37087 (E.D.N.Y. 1992).

Once the government has demonstrated probable cause, "the burden of proof shall lie upon" the claimant. 19 U.S.C. § 1615. Standing is "a threshold issue" for a claimant wishing to contest forfeiture. United States v. One 1982 Porsche 928, Three-Door, License Plate 1986/NJ Temp/534807, 732

F.Supp. 447, 451 (S.D.N.Y. 1990). If the claimant does not have standing, "the court lacks jurisdiction to consider his challenge of the forfeiture." Id. A claimant need not have actual or constructive ownership to have standing; even a possessory interest in the property is sufficient. United States v. $37,590.00, 736 F. Supp. 1272, 1276 (S.D.N.Y. 1990).

If a claimant has standing, it bears the burden of proving by a preponderance of the evidence either 1) that the funds did not have their source in illegal drug transactions and money-laundering, or 2) that it did not know or constructively know -- through conscious avoidance of positive knowledge -- the source and nature of the funds as drug-related (the innocent

owner defense). United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989).

The innocent owner defense is set out in the statute:

> [N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have committed or omitted without [his] knowledge . . . .

21 U.S.C. § 881(a)(7). "Owner" is defined as "any person with a recognizable legal or equitable interest in the property seized." United States v. One Parcel of Real Property, 831 F.2d 566, 567 (5th Cir. 1987) (citing legislative history). Ascertaining knowledge of corporate claimants requires examining the contents of corporate books and records and the actions taken by persons acting as

corporate agents.

To satisfy its burden of proof the claimant may not simply attack the finding of probable cause. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972
(1991). It has the "ultimate burden of proving that the factual predicates for forfeiture have not been met." Banco Cafetero, 797 F.2d at 1160. If the claimant cannot establish that the funds are untainted or that it is an innocent owner, the property is forfeited.

The structure of this kind of case is inherently unfair to claimants which must prove that their money is

legitimate after the funds have already been seized by the government. The government needs only to show probable cause to seize. The difficulty in proving in an American court the legitimate origins of particular assets from abroad is pronounced.

Foreign enterprises conducting business in a foreign language utilizing business practices different from those known to American jurors are at a particular disadvantage. Moreover, it is often difficult to prove a negative, as claimants must. (Yet, the jury was able to precisely differentiate those cases warranting forfeiture from those in which money was not subject to forfeiture. The diligence and determination of this American jury to be fair to foreign claimants is

striking.)

A claimant that surmounts all hurdles and wins a jury verdict is entitled to receive its money promptly. In the instant case the hearing on whether the government had probable cause to seize the funds were not completed until nine months after the funds were seized. The trial was completed more than a year later. Few businesses can function without access to a substantial portion of their assets for that period of time. The claimants who met their burden at trial of proving the legitimate source of their funds will have their money returned to them without any other compensation except interest earned, less court fees for supervision of the funds. They will have been without the use of their money

for the two years since the funds were seized.

## III. APPLICATION OF LAW TO FACTS

### A: MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Under Rule 50(b) of the Federal Rules of Civil Procedure a judge may disregard the jury's verdict only

> if the evidence, viewed in the light most favorable to the non-movants without considering credibility or weight, reasonably permits only a conclusion in the movants' favor.

Sirota v. Solitron Devices, Inc., 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Lous Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The court should disregard a jury determination for which "there is no legally sufficient evidentiary basis enabling a reasonable jury to make it."

1991 Adv. Committee Notes to Rule 50(b).

In the course of the two-month trial in the instant case, the jury conscientiously listened to the evidence, took notes, and was extremely careful in the course of its decision-making. The jurors were provided with notebooks with dividers to enable them to address separately each claimant and each claim in the trial. The fact that the jury decided in favor of the government on some claims and in favor of the claimants in others belies any suggestion that their deliberations were not thorough. The evidence, briefly reviewed below, supported the jury's verdict as to each claimant and each claim.

The following claimants sought the following amounts at trial:

CONFECCIONES ZUNY LTDA, $440,000; CREACIONES IVONNE LTDA, $32,000; CREACIONES KAREN LTDA, $756,625; INCOLCO LTDA, $1,000,000; MANUFACTURAS DE MODAS LTDA, $400,000; TOTE EXPORT MANUFACTURAS LTDA, $392,860; VALERY FASHIONS LTDA, $448,418; ABUCHAIBE HNOS., $200,000 and $54,070; COMERCIAL ESTRELLA LTDA, $301,500; CONFECCIONES Y TEJIDOS NACIONALES LTDA, $549,990; CREACIONES VIVIANA LTDA, $125,025, $50,030, and $50,000; INDUSTRIAS MARATHON LTDA, $805,194.49; MANUFACTURAS INTERNACIONALES LTDA, $599,970; MANUFACTURERA DEL ATLANTICO LTDA, $492,810; SIRACUSA TRADING CO. and the HEIRS OF HERIBERTO CASTRO-MESA, $3,400,000; MANUFACTURAS J.D. LTDA, $98,991; ORGANIZACION J.D. LTDA, $98,990 and $98,800; and CONFECCIONES ELIZABETH

LTDA, $40,000.

The evidence of the claimants indicated -- if believed -- that massive shipments of manufactured garments were sent abroad from modern plants in Colombia to Panama in order to earn dollars legitimately. There they were handed over to ship captains who toured the Caribbean islands trading the garments for goats and local produce, losing some, having some stolen, and with the remainder disposed of through charity in Colombia and other non-traceable channels. Although possible, these and other implausible stories told by claimants' witnesses would justify the jury's skeptical view of the claimants' somewhat inconsistent positions.

The evidence of drug tainting was

overwhelming. A flurry of wire transfer activity followed the arrests of the Londono associates Jurado, Garcia, and Mahecha in Luxembourg. There was a sophisticated and complicated series of connections and financial transactions between the various drug-connected players in this case. After a description of one technique described at trial, the evidence will be more generally summarized.

1. INDUSTRIAS MARATHON LTDA

When the Londono associates were arrested in Luxembourg, authorities seized telephone books, documents, and bank records. Garcia had a business card with a bank account number written on the reverse. The same number had

appeared on one of the faxes intercepted by the Luxembourg Surété Publique from Jurado's apartment in Luxembourg. The account was at a bank in Guernsey, Channel Islands.

Investigation by the Surété revealed that Garcia earlier had arranged for $805,194.49 to be sent to the Guernsey bank from Panama by a Panamanian shell corporation nominally headed by Heriberto Castro-Mesa and Esperanza Rodriguez de Castro, Londono's parents-in-law. Funds from the account in Panama which was the source of the $805,194.49 had been used in 1987 to open other accounts in the name of Heriberto Castro-Mesa and Esperanza Rodriguez de Castro. The other funds in the Panamanian account were forfeited after the Luxembourg trial of Jurado and

Garcia.

When $805,194.49 was electronically transferred to Colombian claimant Industrias Marathon via a New York bank immediately after the arrests in Luxembourg, the money was seized. The testimony of the Analyst Holmes, the C.P.A. Kostoglian, and the former Londono associates confirmed the illicit source of the funds. The evidence was sufficient for a jury to conclude that the funds were the traceable proceeds of illegal drug money-laundering and narcotics transactions, and that claimants were aware of the drug-related sources of the funds.

2. OTHER FORFEITED CLAIMS

At the Luxembourg arrests several pocket address books were seized.

Garcia's book contained the telephone numbers for representatives of the claimants, linking them with a known money-changer and drug money-launderer, Jairo Carrascal. In Colombia authorities seized a telephone book from another known drug money-launderer, Roberto Juri. Many of the numbers in the two telephone books, seized continents apart, were identical.

Witnesses also testified that the bank accounts and records of the corporate claimants were inconsistent with the conduct of a legitimate clothing manufacturing enterprise. The evidence at trial conclusively established that the corporate records and bank statements revealed a pattern of huge same day deposits and debits reflective of drug money-laundering

practices.

Special Customs Agent Steven Haywood of the United States Customs Service set up a phony bank account and entered the drug money-laundering business as a purported money-changer. Periodically he received large amounts of cash driven in cars from the New York City area, originating in cocaine sales there. While conducting his covert money-laundering investigative operation, Haywood was instructed by a money-changer to send electronic funds transfers to corporations including claimants. Special DEA Agent Robert Michaelis testified that an account at Banco Cafetero in Panama was used by Londono and his associates to store and move narcotics proceeds. The account was identified only by a number. Money

was transferred from the Banco Cafetero account to the claimants. Claimants also received electronic funds transfers from several of the identified shell corporations set up by Londono's associates.

Claimants objecting to the verdicts of forfeiture have made no showing that the evidence "reasonably permits only a conclusion in the[ir] favor." Sirota v. Solitron Devices, Inc. 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Louis Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The verdicts as to each claimant and each claim were supported by the evidence. The motions for judgment notwithstanding the verdict are denied.

3. MANUFACTURAS J.D. LTDA -- $98,991

ORGANIZACION J.D. LTDA -- $98,990 and $98,800

The jury at trial determined that claimants Manufacturas J.D. and Organizacion J.D had met their burden of proving that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury supports the verdict.

4. CONFECCIONES ELIZABETH LTDA - $40,000

The jury at trial determined that even though the funds claimed by confecciones Elizabeth were the traceable proceeds of illegal drug activity and drug money-laundering

transactions, claimant had met its burden of proving that it was an innocent owner. It did not "know," through its books and records or corporate representatives and agents, that the funds in question constituted the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury supports the verdict.

B. MOTION FOR A NEW TRIAL

The court has the power to grant a new trial, even where the verdict was justifiable, to prevent a miscarriage of justice. Under Rule 59(a) of the Federal Rules of Civil Procedure, a

court may grant a new trial if

> the jury has reached a seriously erroneous result, or . . . the verdict is a "miscarriage of justice" i.e. . . . the verdict is against the great weight of the evidence . . .

Mallis v. Bankers Trust Co., 717 F.2d 683, 691 (2d Cir. 1983). The standard is difficult to meet. The claimants have raised a number of arguments in support of their motion for a new trial. Each will be addressed in turn.

1. SHIFTING BURDEN OF PROOF

At the hearing on the post-trial motions claimants posed the question whether the shifting of the burdens of proof in forfeiture cases in constitutional. Were a constitutional violation found, a new trial or dismissal would be required. No such

remedy is necessary.

The Second Circuit in United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986), discussed the probable cause requirements where moneys in bank accounts are at stake:

> In almost all cases, once the Government has shown probable cause to believe that someone has sold drugs and deposited the proceeds of a drug sale into a bank account, there will be probable cause to believe that the bank account contains "traceable proceeds" of the sale. . . . The burden will then be on the claimant to demonstrate that no portions of the account . . . are "traceable proceeds" of the drug sale.

Id. at 1160. The court went on to discuss the concerns about burden-shifting and the difficulty of proof:

> No doubt uncertainty caused by the fungibility of money will make it difficult and in may cases impossible for claimants to satisfy this burden. But it is precisely the function of burden of proof rules to determine which party loses where evidence is lacking or

at best ambiguous. Under the Congressional scheme, the risk of uncertainty in determining the traceability of proceeds of drug sales is placed squarely on the claimant, once probable cause has been established.

Id.

The district court is bound by the Second Circuit's determination that Congress' allocation of the burdens of proof in forfeiture proceedings is constitutional. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972 (1991). The court wrote: "we find nothing unconstitutional in congress's allocation of the burdens of proof in forfeiture cases . . . ." Id. at 814; United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982)

(same), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984); United States v. $250,000 in United States Currency, 808 F.2d 895, 901 (1st Cir. 1987) (shifting burdens does not violate fifth amendment); United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989) ("We . . . find the burden-shifting aspect of the statute constitutional."); United States v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65, 66 (9th Cir. 1976) (per curiam) (imposition of burden of proof on the claimant is not unconstitutional); Bramble v. Richardson, 498 F.2d 968, 970 n.2 (10th Cir.) ("[Claimant]'s conception of the forfeiture proceedings is not entirely

accurate. . . . [T]he burden merely shifts to [him] once probable cause has

been established."), cert. denied sub nom. Bramble v. Saxbe, 419 U.S. 1069 (1974); see also United States v. Blackwood, 47 F.2d 849, 851-52 (1st Cir.) (imposing burden of proof on the government was error where probable cause had already been found), cert. denied, 284 U.S. 627 (1931). The motion for a new trial on this ground must be denied.

2. SEPARATE TRIALS

Claimants argue that they were prejudiced by the court's refusal to grant separate trials. The claimants contend that the jury was unable to keep the evidence separated as to each claimant and ascribed to some claimants evidence of drug tainting related solely to other claimants. Claimants move for

a new trial on this ground.

The court first addressed the issue of prejudice from joinder in allocating peremptory challenges among the claimants at the outset of the trial. The jury panel was not large enough to permit each claimant to independently exercise a full set of peremptory challenges. Many potential jurors did not feel they could be fair in a drug-related case. Ultimately a jury representative of the community was selected.

Sharing of peremptory challenges was proper because the interests of the claimants were not adverse to one another. Accord Doralee Estates Inc. v. Cities Serv. Oil Co., 569 F.2d 716, 723 (2d Cir. 1977) (plaintiff allowed his three challenges but defendant and

third-party defendant required to exercise one each and three jointly); Carey v. Lykes Bros. S.S. Co., 455 F.2d 1192, 1194 (5th Cir. 1972) (district court's sharing procedure "expressly authorized by Section 1870"); Moore v. South African Marine Corp., 469 F.2d 280, 281 (5th Cir. 1972) (no error to require shared challenges even where party objects).

Separate trials were not required because the claimants' interests were not hostile. All claimants had the same burden against the government and all wanted the return of their funds. Although some evidence of the background drug money-laundering scheme overlapped, each claimant presented its own evidence to meet its own burden of proving that the funds it claimed were not the

traceable proceeds of illegal drug activity and drug money-laundering transactions. The fact that some claimants were required to prove both the legitimate source of funds and that they were innocent owners, whereas others attempted to prove only that they were innocent owners, does not change this conclusion.

Severance would have severely burdened the court and government. Accord City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 549-50 (E.D.N.Y. 1987). Separate trials would have been a waste of judicial resources and would have caused extreme inconvenience to witnesses. The trial was prolonged even in its combined form because of the necessity for translation of the bulk of the testimony and the

need to instruct the jury on technical financial matters. Denial of the motion to sever in such circumstances is proper. Cf. United States v. Marietta Mfg. Co., 53 F.R.D. 390, 400 (S.D.W. Va 1971) (motion for separate trial denied to avoid protracted delay and duplication of effort). Whether to order separate trials is within the discretion of the trial court. Brown v. Advantage Eng'g, 732 F. Supp. 1163, 1170 (N.D. Ga. 1990); Keister v. Dow Chem. Co., 723 F. Supp. 117, 120 (E.D. Ark. 1989).

That the jury was not confused or claimants prejudiced is reflected in the discriminating verdicts, finding some claims valid and other invalid. The precise questions of the jurors during deliberations, their note-taking, and

their calm attentiveness all belied confusion or prejudice. A joint trial was proper.

### 3. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Claimants charge that the court erred in permitting the government to introduce into evidence wire transfer advises obtained in violation of the Omnibus Crime Control and Safe Street Act, 18 U.S.C § 2510 et seq. (1988 & Supp. III 1991), the federal wiretap statute. The statute prohibits the interception of "electronic communications." which includes a variety of technologies such as electronic funds transfers and electronic communications in storage.

The court has already addressed the claimants' arguments, in Manufacturas

International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). The complaint was dismissed on the ground that the federal wiretap statute does not apply to the seizure of electronic funds transfers by banks following government and court instructions. See 1992 WL 96212, at *10; 1968 U.S. Code Cong. & Admin. News 2112, 2153; United States v. Herring, 933 F.2d 932, 934-35 (11th Cir. 1991) (amendments did not change statute's focus on surveillance and eavesdropping).

The wiretap statute does not apply because in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed. 18 U.S.C. §981(b) (1988 &

Supp. III 1991); 21 U.S.C. § 881(h) (1988 & Supp. III 1991) ("relation-back" doctrine); See, e.g., United States v. One Piece of Real Property Located on Trafalgar Street in City of Aiken, S.C., 700 F. Supp. 857, 860-61 (D.S.C. 1988) (date on government's title relates back to date of crime), aff'd sub nom. United States v. Schiferli, 895 F.2d 987 (4th Cir. 1990). As the Consolidated Bank Cases court wrote:

> The statute cannot apply where, as here, the government reasonably viewed the funds as its own. The concept that ownership of the object is transferred instantaneously at the time of criminality provides a conceptual distinction making the laws governing wiretapping and interference with communications irrelevant.

1992 WL 96212, at *10.

Finally, claimants' unsupported assertion that the introduction into evidence of the wire transfer advises

violated the fourth amendment is groundless. The motion for a new trial on this ground is denied.

4. NEW YORK BANKS

Claimants contend that the court erred in not overruling the protective order granted by the magistrate judge. The magistrate judge prohibited the claimants from taking depositions or issuing subpoenas to employees of the intermediary New York banks which seized the wire transfers. In their deposition and subpoena requests claimants sought information about the instructions given to the banks by the United States Attorneys.

In Consolidated Bank Cases, __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992), the court disposed of claimants'

concerns about the seizure of the subject funds by the New York banks. The court dismissed the action for failure to state a claim, noting that the banks were not

> rogue banks seizing funds carelessly or without justification. The intermediary banks were following the precise oral and written instructions of the United States Attorney and the court.

Id. at *15. Since electronic funds transfers are affected rapidly, the government must be permitted to act without any interference by the banks. The banks normally should not make any independent determinations.

Where banks act as agents of the court they are protected. Id.; cf. K/S Norman Agather v. Sea Trade & Constr., Ltd., 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (same where bank executes writ of

attachment). Claimants require nothing further from the employees of the bank. The protective order was proper.

5. UNITED STATES ATTORNEYS

Claimants complain that the court granted the government's motion in limine barring claimants from calling the United States Attorneys as witnesses at trial. The court has twice addressed claimants' desire to elicit information from the United States Attorneys.

During discovery claimants sought to depose the United States Attorneys involved in this case, but the magistrate judge granted the government's motion for a protective order. The magistrate judge determined that the taking of opposing counsel's deposition is permissible only where (1)

there is no other way to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

The protective order was granted in part because the information could be obtained elsewhere and in part because it is undesirable for United States Attorneys to appear as witnesses at trial to defend statements made at deposition. The magistrate judge's decision was proper. The court dismissed an action filed by claimants against the United States Attorneys who had instructed the banks to seize the funds. Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision).

The claimants have offered nothing to alter the conclusions reached by the magistrate judge and the district judge. There was no relevant information to be obtained from the United States Attorneys who acted ethically and responsibly in connection with the seizure of wire transfers at the New York correspondent banks.

6. EXPERT TESTIMONY

Claimants objected to the court's permitting DEA Intelligence Analyst Holmes and Special DEA Agent Michaelis to testify and to state opinions. Agent Michaelis testified on the basis of the evidence and known drug money transfer techniques that several of the electronic wire transfers wee intended for receipt by Jose Santa Cruz Londono.

There was also testimony about the existence of an overall drug money-laundering scheme. This testimony was based on the evidence at trial as well as the expertise of the witness.

Given the complex nature of the evidence, the jury was aided by this expert testimony. See Fed. R. Evid. 702, 703. Its probative force heavily outweighed any prejudice. Id. Rule 403. DEA agents may testify as experts on illegal activities such as narcotics dealing. United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 111 S. Ct. 179, cert. denied sub nom. Estrada Ruis v.United States, 494 U.S. 1068 (1990). Sophisticated drug money-laundering activities, such as those relied upon by claimants, are a proper subject for expert testimony.

The methods of moving of currency internationally and the maintaining of corporate and bank records are not subjects easily understood without some expert assistance. The jury was repeatedly admonished not to substitute the expert's opinions for the jury's own conclusions about the veracity of the testimony and the meaning of the records which constituted the bulk of the evidence.

The court has broad discretion in determining the qualifications of and need for expert witnesses. Hamling v. United States, 418 U.S. 87, 108 (1974). Claimants have not demonstrated that the court's determination was "manifestly erroneous." Salem v. United States Lines Co., 370 U.S. 31, 35 (1962). The witnesses were properly qualified and

their limited testimony useful and non-prejudicial.

7. BEST EVIDENCE RULE

Claimants' argue that the government's expert accounting witness should not have been permitted to testify as to capital investment, accounting and banking practices, and estimated profits from business enterprises. The testimony was amply supported by, and required by, the huge amount of financial documentary evidence.

Claimants argue that this testimony violates the best evidence rule. The best evidence rule refers to and governs the admission of the contents of "a writing, recording, or photograph." See Fed. R. Evid. art X. It has no

application to the testimony of an expert witness summarizing and analyzing evidence already in the record. Cf. id. Rule 1006. The objection is groundless.

C. MOTION TO RELEASE RES

Claimants Manufacturas J.D and Organizacion J.D., which sustained their burden at trial of proving that their claimed funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions, move for the immediate release of their funds. The government seeks a delay in the release of funds on the grounds that Johnny Daccarett, the owner and legal representative of claimant corporations Manufacturas J.D. and Organizacion J.D., is a fugitive.

The government contends that Johnny

Daccarett has a prior conviction for trafficking in approximately two tons of marijuana. There is also an outstanding indictment against him in New Jersey for tax violations. It is the government's position that since Daccarett is a fugitive, the claimant corporations he represents should be barred under the disentitlement doctrine from receiving funds they rightfully claim.

The disentitlement doctrine provides that one who is a fugitive from justice cannot seek relief from the judicial system the authority of which he is flouting by fleeing prosecution. If a party is avoiding prosecution for a crime, he cannot lay claim to money or property in a related civil proceeding. See, e.g., United States v. 760 SW 1st Street, Miami, Fla., 702 F. Supp. 575,

577 (W.D.N.C. 1989) ("[since he] fits the definition of a fugitive, . . . he may not demand to use the resources of this Court in a civil action to claim property").

1. FUGITIVE STATUS

The first question is whether Daccarett can be considered a fugitive. Claimants Manufacturas J.D. and Organizacion J.D. contend that there has been no showing that Daccarett was ever in this jurisdiction, let alone a showing that he fled to avoid prosecution.

A person can be a fugitive even when he does not "flee" but is simply found outside the jurisdiction. See Jhirad v. Ferrandina, 536 F.2d 478, 483-84 (2d Cir.) (no meaningful distinction

between those leave the jurisdiction and those who have already left and decide not to return), cert. denied, 429 U.S. 833 (1976); United States v. 218 Panther Street, Newfoundland, Pa., 745 F. Supp. 118, 121 (E.D.N.Y. 1990) ("An individual who learns of charges against him while legally outside the jurisdiction 'constructively flees' by deciding not to return."), aff'd sub nom. United States v. Eng, 951 F.2d 461 (2d Cir. 1991). To be considered a fugitive, the individual need not flee or "constructively flee" with the intent of avoiding a pending or intended prosecution. United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) ("whether [he] left before or after . . . indictment is irrelevant"; nor need

there even be an official indictment handed down). Even where an individual is in prison elsewhere or it is otherwise impossible for him to leave, he can be considered a fugitive. See, e.g., United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) ("One may flee even though confined in prison in another jurisdiction.").

It is critical to show that the person sought in the criminal proceeding knows he is wanted by the authorities and then fails to submit to arrest. See United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 644 (1st Cir. 1988) ("Perhaps most importantly, there is no evidence that [the claimant] had notice of this proceeding . . . ."); United States v. Ballesteros-Cordova, 586 F.2d 1321, 1323-24 (9th Cir. 1978)

(intent to avoid prosecution, making an individual a fugitive, can be inferred where he knows the authorities want him and he fails to surrender); United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) (noting that individual was "aware of both the indictment and the civil forfeiture action"); United States v. Schreiber, 535 F.Supp. 1359, 1363 (S.D.N.Y. 1982) (individual who left the country in 1964 became a fugitive in 1966 when he learned he was under indictment and made no effort to return).

We assume that Daccarett was aware of the criminal charges pending against him since the government brought this fact to claimants' attention, and, through them, to their representative

Daccarett. There was no legal barrier to his return to the United States. He should be, and is, treated as a fugitive.

2. "DISENTITLEMENT" DOCTRINE

An individual who is a fugitive can be barred by the disentitlement doctrine from receiving seized funds. By extension, the government's position is that the claimant corporations which Daccarett represented should also be prevented from receiving the funds they claim. A brief explanation of the disentitlement doctrine and its development is necessary to understand the parties' positions.

The first statement of the disentitlement doctrine was in the context of a criminal proceeding, where

the Supreme Court declined to adjudicate an appeal from the merits of a conviction where the appellant was a fugitive. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). Courts extended this doctrine to bar a fugitive from participating in a civil proceeding based on a prior criminal proceeding. In Conforte v. Commissioner, 692 F.2d 587, 589-90 (9th Cir. 1982), the Ninth Circuit held that a fugitive could not contest the assessment of tax liabilities in a civil proceeding where he was a fugitive from the related criminal tax proceeding.

Finally, in 1985 the Ninth Circuit held that the disentitlement doctrine should apply in civil forfeiture proceedings. United States v. $129,374 in United States Currency, 769 F.2d 583,

587-88 (9th Cir. 1985), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986). The doctrine bars not only the fugitive but also the fugitive's successor from contesting the forfeiture while at the same time resisting prosecution in a related criminal action. Id. at 587. No case has been found addressing the question now posed: whether a corporation represented by a fugitive should also be barred by the disentitlement doctrine from claiming funds in a forfeiture proceeding.

A trial court has discretion in applying the disentitlement doctrine. United States v. Veliotis, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984) ("this matter resides within the sound discretion of the Court"). The reasons for exercising discretion in the claimants' favor are

overwhelming. First, in this case no credible evidence has been submitted demonstrating that the "fugitive" controls any claimant or that he will receive the benefit of proceeds returned to a claimant. Nor is there any evidence to suggest that Daccarett is flouting the judicial system in this forfeiture case. On the contrary, the attorney for claimants Manufacturas J.D. and Organizacion J.D. asserts that Daccarett has been willing to be deposed in person at an embassy in Colombia or by telephone but the government has refused.

Finally, the civil forfeiture is independent of the criminal case pending against Daccarett. In disentitlement cases the criminal indictment, prosecution, or potential prosecution

should be related to the forfeiture proceeding. United States v. $129,374 in United States Currency, 769 F.2d 583, 588 (9th Cir. 1985) ("[the] criminal conviction and the property involved . . . are integrally related parts of the same unlawful drug dealing scheme"), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986); Schuster v. United States, 765 F.2d 1047, 1049 (11th Cir. 1985) ("no question that the civil case . . . is related to the criminal case"); United States v. $45,940 in United States Currency, 739 F.2d 792, 794 (2d Cir. 1984) (question is whether his fugitive "status bars him from defending the related forfeiture proceeding") (emphasis added). In this All Funds case, the indictment at issue is in a

different district and it is for tax violations. The government has not suggested that the tax violations are related to the drug money-laundering activities underlying this All Funds action.

It is the claimant corporations, Manufacturas J.D. and Organizacion J.D., which prevailed at trial -- not Johnny Daccarett. The government has shown no persuasive reason to bar the corporate claimants from receiving their funds. The jury found that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. Daccarett's status as a fugitive is irrelevant. The motion to release the res must be granted.

D. MOTION TO STAY JUDGMENT AND WAIVE SUPERSEDEAS BOND

Claimants Abuchaibe Hnos., Comercial Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda move for an order staying execution of judgment pending appeal without posting a supersedeas bond.

Since the funds are in the possession of the court and gathering interest, there will be no prejudice to the government from a stay of execution of judgment. Nor is there any risk that the property will be removed:

> Unlike the typical case where the defendant ship stealthily absconds from port and leaves the plaintiff with no res from which to collect, here the defendant res is in the possession of the United States and thus in no danger of disappearing.

> . . . Having prevailed below, the government, if it wins on appeal is assured of execution regardless of whether [claimant] files a bond or stays execution of the judgment.

United States v. $95,945.18 in United States Currency, 913 F.2d 1106, 1109 (4th Cir. 1990); see also United States v. One Lot of $25,721 in Currency, 938 F.2d 1417, 1419 (1st Cir. 1991) (supersedeas bond not required).

IV. CONCLUSION

The jury's verdict of forfeiture of eighteen of the twenty-two amounts seized is fully supported by the evidence. The motions for judgment notwithstanding the verdict are denied. No errors warrant granting the motions for a new trial. The amounts claimed by Manufacturas J.D. and Organizacion J.D. are ordered released in seven days from

the date of this memorandum; the delay will permit application for a stay in the Court of Appeals. Execution of the judgment of forfeiture of funds claimed by Abuchaibe Hnos., Comercial Estrella Ltda, Confecciones y Tejidos Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda is stayed during the pendency of the appeal. No supersedeas bond is required.

SO ORDERED.

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA | |
| against- | FINAL - JUDGMENT AND ORDER |
| ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL., | cv-90-2510 |
| Defendants. | |

The issues in the above-captioned action were tried before a jury in the Eastern District of New York from March 9, 1992 through May 8, 1992; and

Nineteen claimants and the plaintiff UNITED STATES OF AMERICA presented witnesses and documentary evidence; and

The jury considered the issues in this action and, after due deliberation, rendered a unanimous verdict on May 8, 1992 forfeiting the following funds to plaintiff UNITED STATES OF AMERICA after deciding that the following fifteen claimants had failed to meet their burden of proving that the eighteen claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions or that they were innocent owners:

1. Claimant: CONFECCIONES ZUNY LTDA
   Amount: $440,000

2. Claimant: CREACIONES IVONNE LTDA
   Amount: $32,000

3. Claimant: CREACIONES KAREN LTDA
   Amount: $756,625

4. Claimant: INCOLCO LTDA
   Amount: $1,000,000

5. Claimant: MANUFACTURAS DE MODAS LTDA
   Amount: $400,000

6. Claimant: TOTE EXPORT MANUFACTURAS LTDA
   Amount: $392,860

7. Claimant: VALERY FASHIONS LTDA
   Amount: $448,418

8. Claimant: ABUCHAIBE HNOS.
   Amount #1: $200,000
   #2: $54,070

9. Claimant: COMERCIAL ESTRELLA LTDA
   Amount: $301,500

10. Claimant: CONFECCIONES Y TEJIDOS NACIONALES LTDA
    Amount: $549,990

11. Claimant: CREACIONES VIVIANA LTDA
    Amount #1: $125,025
    #2: $50,033
    #3: $50,000

12. Claimant: INDUSTRIAS MARATHON LTDA
    Amount: $805,194.49

13. Claimant: MANUFACTURAS INTERNACIONALES LTDA
    Amount: $599,970

14. Claimant: MANUFACTURERA DEL ATLANTICO LTDA
Amount: $492,810
15. Claimant: SIRACUSA TRADING Co. and the HEIRS OF HERIBERTO CASTRO-MESA
Amount: $3,400,000; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sum of $98,991 to claimant MANUFACTURAS J.D. LTDA after deciding that the claimant had met its burden of proving that the claimed amount was not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sums of $98,990 and $98,800 to claimant ORGANIZACION J.D. LTDA after deciding that the claimant had met its burden of proving that the two claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

They jury rendered a unanimous verdict on May 8, 1992 returning the sum of $40,000 to claimant CONFECCIONES ELIZABETH LTDA after deciding that the claimant had met its burden of proving that it was an innocent owner of the claimed amount.

ORDERED AND ADJUDGED that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the

court, less fees, is hereby condemned and forfeited to the use and benefit of the UNITED STATES of AMERICA; and that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the court, less fees, be turned over to the UNITED STATES OF AMERICA in seven days and that the Clerk of the Court issue a check in the total amount payable to "United States Marshals Service" and then forward that check to United States Attorney, ATTN: Arthur P. Hui, Esq., One Pierrepont Plaza, 11th Floor, Brooklyn, NY 11201; this order is stayed pending completion of appeals.

ORDERED AND ADJUDGED that the sum of $98,991 plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant MANUFACTURAS J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Manufacturas J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso 2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sums of $98,990 and $98,800, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant ORGANIZACION J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Organizacion J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso

2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sum of $40,000, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant CONFECCIONES ELIZABETH LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Davis Markel & Edwards - Trust Account" and then forward that check to M. Blair Sibley, Esq., Davis Markel & Edwards, 66 West Flagler Street, Suite 1100, Miami, Florida 33130.

ORDERED, ADJUDGED, AND DECREED that pursuant to Rules 54(b) and 58 of the Federal Rules of Procedure the Clerk of the Court enter final judgment.

SO ORDERED.

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

# APPENDIX B

**UNITED STATES COURT OF APPEALS**

For the Second Circuit

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Nos. 1264, 1265---August Term 1992

(Argued: April 2, 1993
Decided: Sep. 10 1993)

Docket Nos. 92-6229, 92-6259

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

UNITED STATES OF AMERICA,

*Counter-Defendant-Appellee,*

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPRESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

*Claimants,*

MERRILL LYNCH BANK, Certain funds contained in Account No. 044000804961700114433 held at the MERRILL LYNCH BANK 1 Columbus;PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF

NEW YORK IN THE NAMES OF SIRACUSA TRADING CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO CAMPO; ANA MILENA SANTA CRUZ;RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTDA.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC. BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTEÑA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLOMBIANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

*Defendants,*

ABUCHAIBE HNOS.LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON

LTDA; MANUFACTURERAS DE MODA LTDA; INCOLCO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

*Defendants-Appellants,*

EMPRESA NELSON GOMEZ,
O. "FASTER" and COSTAFAST,

Counter-Claimants.

BEFORE:

OAKES, PIERCE, and PRATT,
*Circuit Judges.*

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Appeal in a civil forfeiture case from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, denying motions for judgment notwithstanding the verdict and for a new trial, releasing amounts claimed by two claimants, and forfeiting the funds claimed by all other claimants.

Affirmed.

ISIDORO RODRIGUEZ, Barranquilla, Colombia S.A., for Defendants-Appellants Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.

MONTGOMERY BLAIR SIBLEY, Miami,FL (Davis, Markel & Edwards, of counsel), for Defendants-Appellants Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Tote Export Manufacturas Ltda., and Creaciones Ivonne.

ARTHUR P. HUI, Assistant United States Attorney, Brooklyn, NY (Mary Jo White, United States Attorney for the Eastern District of New York, of Counsel), for Appellee.

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PRATT, Circuit Judge:

## INTRODUCTION

Illegal sales of controlled substances generate billions of dollars in revenue every year. Narcotics traffick

ers continually seek to make their illegal income appear legitimate. When international drug conglomerates attempt to move their profits beyond the reach of law enforcement authorities, their monies are frequently funneled through financial institutions in the United States. Money laundering has become so sophisticated

> that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic fund transfers.

House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986). The arteries of international banking systems have become the "lifeblood" of the international drug trade. See 132 Cong. Rec. S9938, S9986 (daily ed. July 31, 1986);

President's Comm'n on Organized Crime, The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 4-8 (1984).

In an attempt to stop the flow of illicit money back to drug suppliers, congress in the past decade has passed several acts aimed at drug-trafficking and money-laundering activities. See, e.g., International Narcotics Control Act of 1992, Pub. L. No. 102-583, 106 Stat. 4914, codified at 12 U.S.C. §§ 635, 22 U.S.C. §§ 2151, 2291; Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, codified at 18 U.S.C. §§ 1956, 1957. While a money-laundering conviction results in automatic forfeiture to the government of any property involved in the offense, see 18 U.S.C. § 982(a), the government

can also institute civil forfeiture proceedings without first obtaining a conviction. See 18 U.S.C. §981. This case tests the effectiveness of civil forfeiture as a tool for seizing and forfeiting proceeds of narcotics trafficking as they pass through our banking system.

## FACTS AND BACKGROUND

There are two groups of claimants: the "Atlantico Claimants", consisting of Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.; and the "Ba

rranquilla Claimants", consisting of Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Ltda., Tote Export Manufacturas Ltda., and Creaciones Ivonne Ltda. Both sets of claimants appeal from a final judgement and other rulings of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, following a jury verdict that forfeited to the government more than $10,000,000, pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881. United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984 (E.D.N.Y. 1992) (All Funds) (technical amendment to opinion filed on Sept. 14, 1992).

The forfeitures arose out of an

international effort to impede the drug-trafficking and money-laundering activities of the Cali cartel, a Colombian conglomerate headed by Jose Santacruz-Londoño, which allegedly imports approximately 3000 kilograms of cocaine a month into the United States. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts.

When a customer wants to commence an EFT, its bank sends a message to the transfer system's central computer, indicating the amount of money to be transferred, the sending bank, the re-

ceiving bank, and the intended beneficiary. The Central Computer then adjusts the account balances of the sending and receiving banks and generates a printout of a debit ticket at the sending bank and a credit ticket at the receiving bank. After the receiving bank gets the credit ticket, it notifies the beneficiary of the transfer. If the originating bank and the destination bank belong to the same wire transfer system, then they are the only sending and receiving banks, and the transfer can be completed in one transaction. However, ff the originating bank and the destination bank are not members of the same wire transfer system, which is often the case with international transfers, it is necessary to transfer the funds by a series of transactions

through one or more intermediary banks.

The seizures at issue were precipitated by the arrests of three Santacruz-Londoño associates in Luxembourg on June 28 and 29, 1990. These men had opened hundreds of bank accounts throughout Europe and deposited large sums of money in them for the Cali cartel. Anticipating that these arrests would trigger an effort by the cartel to move its monies to Colombia before they could be confiscated, Luxembourg law-enforcement authorities requested the assistance of several countries to freeze monies related to the cartel. During July and August 1990, a flurry of electronic funds transfers from the suspect accounts ensued, resulting in the seizure of $ 30 million in Europe, $ 16 million in Panama, and $ 12 million

in the United States.

The $ 12 million seized in the United States was the aggregate of dozens of EFTs sent through New York City intermediary banks that had correspondent banking relationships with Panamanian and Colombian banks, including Banco Atlantico, Manufacturers Hanover, The Bank of New York, and Merrill Lynch. After receiving the subject EFTs, the intermediary banks were supposed to credit the accounts of designated correspondent Colombian banks; the Colombian banks were then supposed to notify the beneficiaries that the funds were available. However, through both oral orders and a series of eight arrest warrants in rem, government agents instructed the intermediary banks in New York to attach "all funds" on deposit in the names of

various individuals and entities connected with Santacruz-Londoño and "all related entities and individuals", and to inform the agents about all transfers that were destined for a third-party beneficiary in Colombia. The intermediary banks complied with the agents' directions; they initially froze the seized funds and later transferred them to the clerk of the court who now holds them pending the outcome of this appeal.

Each successive warrant included more names. If the government agents seized funds destined for a corporation not yet named in the complaint, it would amend the complaint to add that corporation's name soon after the seizure. By the seventh amended complaint and its accompanying warrant, all but one of the claimants in this action were explicitly

named. The Drug Enforcement Agency ("DEA") also subpoenaed from the intermediary banks financial records of any accounts related to the entities named in the complaint.

The ten Atlantico Claimants and seven Barranquilla Claimants (collectively "claimants"), purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to approximately $ 6.5 million of the seized funds, denied all of the allegations in the in rem complaint, and claimed that their monies had been derived from legitimate sales of clothing. The Atlantico Claimants also brought two counterclaims, seeking damages for alleged violations of the fourth and fifth amendments, of the Electronic Communications Privacy

Act, see 18 U.S.C. §§ 2510-2520 and §§ 2701-2710, of the Right to Financial Privacy Act, see 12 U.S.C. §§ 3401-3422, of the Federal Tort Claims Act, see 28 U.S.C. §§ 2671-2680, and of the civil forfeiture statutes, see 21 U.S.C. § 881; 18 U.S.C. § 981. Their counter-claims were dismissed before trial.

In a related action, claimants sued the intermediary banks in the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, for loss of the use of their funds and violation of various federal and state statutes. Judge Weinstein granted summary judgment for the banks, holding that they could not be held liable for following government orders respecting claimed government funds. Manufacturas International, Ltda v.

Manufacturers Hanover Trust Co., 792 F.Supp. 180, 196 (E.D.N.Y. 1992) (Consolidated Bank Cases).

In still another related action, claimants sued the United States attorneys who had ordered the banks to seize the funds; Judge Weinstein dismissed that suit for failure to state a claim. Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

On May 13, 1991, after an ex parte, in camera hearing, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture proceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. §881(i) and 18 U.S.C. § 981(g). Two

weeks later, Judge Weinstein held a three-day evidentiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable. Claimants' motion to vacate the probable-cause finding and to suppress evidence obtained by the DEA subpoenas were denied on February 19, 1992.

On March 9, 1992, a two-month jury trial began. The government presented extensive evidence, including corporate and banking records from all over the world and the testimony of witnesses familiar with the Cali cartel's operations. That evidence linked Santacruz-Londono's drug proceeds to various Panamanian and Colombian shell corporations. The claimants tried to show that the monies were the legitimate profits from

sales of clothing made in Colombia and Panama. They claimed that massive shipments of clothing were handed over to ship captains who toured the Caribbean islands, trading some for produce, livestock, and currency, losing some in transit, having some stolen, and finally disposing of the remainder of the shipments through charitable means. All Funds, 801 F. Supp. at 992.

The jury found that eighteen of the twenty-two amounts seized were forfeitable. For the remaining amounts, the jury found that those claimed by Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. were not traceable proceeds of illegal money-laundering and narcotics transactions, and that Confecciones Elizabeth Ltda. was an innocent owner. After the trial, those claimants who

received an adverse jury decision moved for judgment notwithstanding the verdict and for a new trial; both motions were denied. Judge Weinstein ordered the release of the amounts found not to be forfeitable and stayed execution of the forfeitures pending this appeal. Most of the claimants have appealed. However, Siracusa Trading Company, a claimant whose funds were seized from Merrill Lynch's office in Columbus, Ohio, and Confecciones Elizabeth Ltda. the claimant found to be an innocent owner, did not appeal.

Comercial Samora, one of the Atlantico Claimants, has also appealed, although it did not participate in the civil forfeiture trial. On the first day of the trial, Comercial Samora withdrew its verified claim and all other

papers that it had filed in the proceedings. Judge Weinstein consequently entered a separate judgment of forfeiture on June 5, 1992, against the $124,000 originally claimed by Comercial Samora; in his August 5, 1992, opinion, Comercial Samora is noticeably absent from the list of claimants at trial. All Funds, 801 F. Supp. at 992. Nevertheless, Comercial Samora has appealed with the rest of the Atlantico Claimants from the August 5, 1992, judgment; it did not file a separate brief on appeal, and no separate arguments were made on its behalf.

The claimants, including the two whose funds were found not to be the proceeds of illegal drug trafficking, raise numerous issues on appeal, challenging the validity of the seizures and

pleadings, various aspects of the trial, dismissal of the counterclaims, and the district court's allowance of the execution of an IRS levy. For the reasons stated below, we affirm.

## DISCUSSION

The conceptual underpinnings of civil forfeiture can be traced back to ancient Roman and medieval English law, both of which made objects used to violate the law subject to forfeiture to the sovereign. See United States v. 785 St. Nicholas Ave., 983 F. 2d 396, 401-02 (2d Cir.) (St. Nicholas Ave.) (discussing historical origins of forfeiture), cert. denied, 61 U.S.L.W. 3772 (1993). Our laws providing for official seizure of property used in criminal activity perpetuate the legal fiction that "prop

erty used in violation of law was itself the wrongdoer that must be held to account for the harms it had caused." United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126, 1135 (1993) (Buena Vista Ave.). Because the property, or res, is considered the wrongdoer, it is regarded as the actual party to in rem forfeiture proceedings. Id.

Civil forfeiture has recently gained new life as an instrument of federal law enforcement, particularly as a weapon in the "war on drugs". As part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, congress strengthened civil forfeiture as a means of confiscating illegal substances and the means by which they are manufactured and distributed. Pub. L. No 91-513, 84 Stat. 1276 (1970), codified at 21 U.S.C.

§§ 881-896. In 1978 congress amended the act to authorize the seizure and forfeiture of the proceeds of illegal drug transactions as well. The statute provides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance [as well as] all proceeds traceable to such an exchange." Pub. L. No. 95-633, 92 Stat. 3777 (1978), codified at 21 U.S.C. § 881(a) (6) (emphasis added).

Now "one of the most potent weapons in the judicial armamentarium", see United States v. 384-390 West Broadway, 964 F. 2d 1244, 1248 (1st Cir. 1992) (West Broadway) (discussing widespread use of in rem proceedings against drug

offenders, civil forfeiture has become a favored method for imposing significant economic sanctions against narcotics traffickers. However, the ease with which the government can seize property and the potential hardships caused to innocent owners who seek to recover their property once the government has seized it have elicited concern from courts and commentators alike. Given that the reach of civil forfeiture is constantly expanding to new realms -- in this case, to electronic funds transfers between banks -- the courts must ensure that constitutional and procedural safeguards remain intact.

A. Seizures.

There are three ways the government can institute civil forfeiture in rem proceedings under 21 U.S.C. § 881.

First, it can follow the process set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules"). 21 U.S.C. § 881(b). Second, it can obtain a seizure warrant in the manner provided for in the Federal Rules of Criminal Procedure, which requires a finding of probable cause ex parte by a judicial officer. Fed. R. Crim. P. 41(c). Third, it can seize property without judicial process "when the Attorney General has probable cause to believe the property is subject to civil forfeiture." 21 U.S.C. § 881(b)(4). See St. Nicholas Ave., 983 F. 2d at 402 (discussing three options); United States v. 4492 S. Livonia Rd., 889 F 2d 1258, 1262-63 (2d Cir. 1989) (Livonia Rd.) (same). In this case, the government used the first and third

options, neither of which requires pre-seizure judicial approval. See United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 941 F. 2d 1428, 1432 n.5 (11th Cir. 1991).

Before analyzing the validity of the seizures here, we note that even when the initial seizure is found to be illegal, the seized property can still be forfeited. See United States v. $37,780 in United States Currency, 920 F.2d 159, 163 (2d Cir. 1990) (holding that "illegal seizure of property does not immunize that property from forfeiture"). This is because seizure and forfeiture are two distinct events. While both require the government to have probable cause, the consequences of lack of probable cause may differ depending on the event. Absence of proba

ble cause at the time of the seizure may result in the suppression of evidence in later proceedings, but the defendant property itself cannot be suppressed from the forfeiture action. See id. In contrast, a failure to establish probable cause on the forfeiture issue will preclude forfeiture of the property altogether. See discussion Part B, infra.

1. Compliance with Supplemental Rules.

The seizures of at least nine of the EFTs followed the process prescribed by the Supplemental Rules. Under the Supplemental Rules, the government begins by filing a verified complaint in the district where the seizure (arrest of the property) will occur. Supp. Rule C(2). Ordinarily, the court must review

the papers authorizing an arrest warrant in rem. See Supp. Rule C(3). However, in actions for "forfeitures for federal statutory violations", as in this case, "the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the * * * property without requiring a certification of exigent circumstances." Id. (emphasis added).

Claimants argue that the in rem complaints failed to comply with the particularity requirements for pleadings set forth in the Supplemental Rules. Two rules address the level of particularity required in forfeiture complaints. Rule C(2) states that the complaint "shall describe with reasonable particularity the property that is the subject of the action." Rule

E(2)(a) specifies that the complaint must "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

These standards are more stringent than the general pleading requirements set forth in the federal rules of civil procedure, see Livonia Rd., 889 F.2d at 1266, and implicit accommodation to the drastic nature of the civil forfeiture remedy. West Broadway, 964 F.2d at 1248; see also 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3242 (1973). The particularity-of-pleading requirements in forfeiture cases provide a "way of ensuring that

the government does not seize and hold, for a substantial period of time, property to which, in reality, it has no legitimate claim." Livonia Rd., 889 F.2d at 1266 (quoting United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 638 (1st Cir. 1988)).

The complaint does not have to meet the ultimate trial burden of showing probable cause for forfeiture; it simply needs to establish a "reasonable belief that the government can show probable cause for forfeiture at trial." United States v. U.S. Currency, in the Amount of $150,660.00, 980 F.2d 1200, 1204-05 (8th Cir.1992). In other words, the complaint need not allege facts sufficient to show that specific property is tainted, but facts sufficient to support a reasonable belief that the government

can demonstrate probable cause for finding the property tainted. Id. at 1205; see also United States v. One Parcel of Real Property, 921 F.2d 370, 376 (1st Cir. 1990); Pole No. 3172, Hopkinton, 852 F.2d at 640.

Claimants contend that the in rem complaints did not contain a particular description of the funds to be seized or sufficient allegations to link the funds to illegal drug activity. More specifically, they argue that the use of the phrase "all related entities and individuals" in the complaint unduly broadened the scope of the warrant and impermissibly gave the government "full discretion" to seize whatever property it desired.

Whether a forfeiture complaint is sufficiently particularized to reach a

given piece of property is an issue of law subject to plenary review. West Broadway, 964 F.2d at 1248; U.S. Currency, in the Amount of $150,660.00, 980 F.2d at 1204. In determining whether a complaint satisfies rule E(2) (a), a court may also consider supporting affidavits that may cure a lack of particularity in the complaint itself. Livonia Rd., 889 F.2d at 1266.

If the complaint had described the subject properties as simply "all funds on deposit in any accounts maintained * * * in the name [] of * * * Jose Santacruz-Londoño" and "all related entities and individuals", without more, then the claimants' argument might be well taken. However, given that the names of the claimants were gradually added by the successive amendments to

the complaint, we will discuss in this section here only those seizures that were preceded by a complaint and arrest warrant that explicitly named the intended beneficiary. All other seizures, that is, those made before the complaint and arrest warrant specifically mentioned the EFT's intended beneficiary, will be treated as warrantless seizures, which are discussed in the next section. This approach will obviate any dependence on the "related parties" language in the warrant.

The successive complaints name as defendants "all funds on deposit" in certain banks "in the names of "various named claimants, "including, but not limited to" specific account numbers. The complaints allege that Santacruz-Londoño "caused substantial sums of mon

ies" from narcotics trafficking and money laundering to be transferred through accounts, "including the defendant accounts", and credited to accounts, including those of various named claimants. In addition, an international Letter Rogatory from the Eastern District of New York is incorporated by reference and attached to the complaint. It describes in greater detail the government's investigation since 1979 of Santacruz-Londoño, the arrests of the three cartel members in Luxembourg, and the use of Colombian shell corporations for disguising the illegal nature of the narcotics proceeds.

By naming both the intermediary banks through which the funds were to be transferred and the intended beneficia

ries of the EFTs, the complaint described the subject property with "reasonable particularity". See Supp. Rule C(2). By recounting Santacruz-Londoño's activities and methods of funneling his narcotics proceeds through various New York banks for ultimate deposit in Colombian bank accounts, the complaint states "the circumstances from which the claim arises" with sufficient particularity for the claimants to "commence an investigation of the facts and frame a responsive pleading". See Supp. Rule E(2).

In this case, the claimants filed verified claims and responsive pleadings to the Seventh Amended Complaint in rem without moving for a more definite statement. We conclude that the complaints and their accompanying warrants

of arrest complied with the pleading requirements of the Supplemental Rules.

2. Seizure without Judicial Process.

At least eleven of the amounts were seized either without a warrant or prior to the issuance of a warrant that explicitly named the intended beneficiary of the EFT. We will analyze all such seizures as warrantless seizures. When the "Attorney General has probable cause to believe" that property is subject to forfeiture under § 881, the government is authorized to seize the property without judicial process. 21 U.S.C. § 881 (b) (4).

Therefore, the question is whether the assistant United States attorneys, as representatives of the Attorney Gen

eral, had "probable cause to believe" that the EFTs were "subject to civil forfeiture under [§ 881]" at the time they requested the intermediary banks to attach the subject EFTs. Clearly they did. This is not a case in which the government "stumbled" into a seizure without any prior information about the subject property. See, e.g., $37,780 in United States Currency, 920 F.2d at 163 (holding that DEA agents at airport lacked probable cause to seize money from claimant's attaché case at time of seizure). Instead, they knew that Santacruz-Londoño, who had already been indicted in this country for various narcotics and money-laundering violations, would probably be directing the transfer of illicit income through particular New York banks to the accounts

of several of his "businesses" in Colombia.

There are two additional statutory requirements for seizures without judicial process. First, after seizure the government must institute forfeiture proceedings "promptly". 21 U.S.C. § 881 (b). Second, the proceedings should follow applicable customs laws, 21 U.S.C. § 881 (d), which are found at 19 U.S.C. §§ 1595a to 1615. In this case, the government satisfied both requirements. It filed a civil forfeiture complaint within days of each warrantless seizure, and the resulting forfeiture proceeding followed the applicable customs laws.

3. Fourth-Amendment Concerns.

Claimants argue that their fourth-amendment rights were violated in three

instances: (1) when EFTs were seized without a warrant; (2) when EFTs were seized pursuant to a rule C(3) warrant without a prior judicial determination of probable cause; and (3) when the government gained access to their financial records from the intermediary banks without a warrant.

The Fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, * * * and particularly describing the place to be searched[] and the * * * things to be seized." U.S. Const. amend. IV.

a. The Warrant Requirement.

We first address the fourth amend

ment's applicability to warrantless seizures made pursuant to 21 U.S.C. § 881 (b)(4). While some circuits have held that the fourth amendment's warrant requirement is inapplicable in light of the statute's plain language allowing seizure without judicial process, see, e.g., United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 158 (3d Cir.) (only need probable cause, not a warrant, because property subject to forfeiture is contraband), cert. denied, 454 U.S. 818 (1981); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983) (warrantless seizure of automobile pursuant to § 881 (b)(4) does not offend fourth amendment); United States v. Valdes, 876 F.2d 1554, 1557 (11th Cir. 1989) (warrantless seizure of automobiles used to facili

tate drug transaction did not violate fourth amendment), this circuit requires seizures made pursuant to § 881 (b)(4) to comport with the fourth amendment, see, e.g., United States v. LaSanta, 978 F.2d 1300, 1304-05 (2nd. Cir. 1992) (warrantless seizure of vehicle must meet a recognized exception to fourth amendment); cf. In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307, 311 (1st Cir. 1988) (fourth amendment applies to forfeiture seizures); United States v. Linn, 880 F.2d 209, 215 (9th Cir. 1989) (same).

Therefore, to be valid the warrantless seizures must fall within one of the recognized exceptions to the fourth amendment's warrant requirement. LaSanta, 978 F.2d at 1305. The govern

ment argues that the exigent-circumstances exception justifies any warrantless seizures made in this case. They claim that EFTs can be "completed in a matter of minutes or hours", and therefore present "greater exigencies than the seizure of a conveyance[] or perhaps[] any other kind of property". Because the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here. The seizures made pursuant to § 881 (b)(4), therefore, did not violate the fourth amendment.

b. The Probable-Cause Requirement.

With respect to the EFT seizures that were made pursuant to an in rem warrant, claimants argue that because

the warrants were issued "forthwith" by a "clerk of the court", without a preceding probable-cause determination, see Supp. Rule C(3), they failed to satisfy the fourth amendment's probable-cause requirement. Several courts have held the Supplemental Rules' summary-warrant procedures unconstitutional. See, e.g., United States v. Life Ins. Co., 647 F. Supp.732, 742 (W.D.N.C. 1986) ("without a determination of probable cause by a qualified judicial officer, [§] 881(b) violates the Warrants clause of the Fourth Amendment"); United States v. $128,035 in U.S. Currency, 628 F. Supp. 668, 672-73 (S.D. Ohio) ("procedure authorized by § 881(b) runs afoul of minimal Fourth Amendment procedural requirements"), appeal dismissed, 806 F.2d 262 (6th Cir. 1986). Other courts have held

that in rem warrants are not true "warrants" subject to fourth-amendment strictures. See, e.g., United States v. TWP 17 R 4, 970 F.2d 984, 987-89 (1st. Cir. 1992) (posting an in rem warrant on property not a seizure for purposes of fourth amendment); United States v. Turner, 933 F.2d 240, 245 (4th Cir. 1991) (in rem warrant more analogous to a summons, not a "warrant" within the meaning of fourth amendment).

In this circuit, just as warrantless seizures under § 881 (b)(4) must satisfy the fourth amendment, so must seizures made with warrants pursuant to the Supplemental Rules. Therefore, although the plain language of § 881(b) allows for the issuance of a warrant without probable cause, see, e.g., One 1978 Mercedes Benz, 711 F.2d at 1302

("If [Attorney General] lacks probable cause * * * he may file a verified complaint pursuant to the maritime rules and effect the seizure pursuant to that process"), the fourth amendment mandates the existence of probable cause at the time of seizure. $37,780 in U.S. Currency, 920 F.2d at 163 (fourth amendment requires government to have probable cause at the time it seizes money). However, the government need not obtain a judicial determination of probable cause prior to seizure. While "absent an `extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified", the Supreme Court has held that "such an extraordinary situation exists when the government

seizes items subject to forfeiture." United States v. Eight Thousand Eight Hundred & Fifty Dollars, 461 U.S. 555, 562 n.12 (1983) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 633 (1974)).

Therefore, the government must have probable cause at the time the clerk issues the warrant in rem, but need not demonstrate that it had probable cause at the time of the seizure unless a claimant challenges the validity of the seizure. As discussed in section 2 above, the government had probable cause to believe that the defendant funds were the proceeds of illegal narcotics trafficking at the time they were seized.

c. Privacy Interests in Financial Records.

Finally, claimants argue that the DEA's subpoenas of all the financial records at the intermediary banks relating to the EFTs violated their fourth-amendment rights. The government contends that the claimants do not have any protectable fourth-amendment interest in the bank records at issue, because they are not customers of the intermediary banks. We agree. Claimants hold accounts with Colombian banks, which have accounts with the intermediary banks. The claimants' relationship with the intermediary banks is too remote to afford the claimants any legitimate expectation of privacy in information about EFTs being received by the intermediary banks.

Even if claimants had their own accounts with the intermediary banks, information regarding those accounts would not be protected by the fourth amendment. In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court held that a bank customer had no "protected Fourth Amendment interest" in the copies of checks and other records the bank retained. Id. at 440. The Court stated that the fourth amendment "`at the most guards against * * * too much indefiniteness or breadth in the things required to be "particularly described," if * * * the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.'" Id. at 445-46 (quoting Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946)).

The Court reinforced Miller in S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984), where the Securities and Exchange commission had subpoenaed an individual's financial records from two broker-dealer firms. The court held that the individual had no fourth-amendment claim, because once he gave his financial information to someone else, "even on the understanding that the communication [wa]s confidential," he could not object if the third party conveyed that information to law-enforcement authorities. Jerry T. O'Brien, Inc., 467 U.S. at 743 (citing Miller, 425 U.S. at 443). The Court also noted that a "target" of an investigation has no right to notice of subpoenas issued to third parties. Id. at 742-43.

Because the DEA was authorized to demand information regarding the EFTs from the intermediary banks and the materials requested were relevant to their investigation, we conclude that no fourth-amendment violation occurred here.

4. Right to Financial Privacy Act.

The Right to Financial Privacy Act ("RFPA") prohibits "financial institutions" from giving the government access to "the information contained in the financial records of any customer" absent a search warrant, subpoena, court order, formal written request, or customer authorization. 12 U.S.C. § 3402. Congress enacted the RFPA in part as a response to Miller, 425 U.S. 435. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978), reprinted in 1978

U.S.C.C.A.N. 9273, 9306; see also United States v. Mann, 829 F.2d 849, 851 (9th Cir. 1987); Duncan v. Belcher, 813 F.2d 1335, 1337 (4th Cir. 1987). However, the "most salient feature of the Act is the narrow scope of the entitlements it creates", because congress wanted to "minimize[] the risk that customers' objections to subpoenas will delay or frustrate agency investigations." Jerry T. O'Brien, Inc., 467 U.S. at 745-46.

If the government gains access to financial records through a warrant, subpoena, court order, or written request, it must give the financial institution's "customer" simultaneous notice of the access. see 12 U.S.C. § 3405(2) (administrative subpoena and summons); 12 U.S.C. § 3406(b) (search warrant); 12 U.S.C. § 3407(2) (Judicial

subpoena); 12 U.S.C. § 3408(4)(A) (formal written request). In this case, however, the DEA's subpoenas "for all financial records" of "any and all accounts related to" the claimants explicitly instructed the intermediary banks not to disclose the existence of their requests.

The Barranquilla Claimants contend that since they were not given notice of the government's access to the financial records, the evidence obtained from the subpoenas should have been suppressed at trial. The Atlantico Claimants argue that Judge Weinstein improperly dismissed their counterclaim alleging that the government and the intermediary banks were liable under the RFPA for disclosing information about the EFTs.

In response to both arguments, the

government maintains that the claimants are not protected by the RFPA, because they are not "customers" of the intermediary banks. Under the RFPA, a "customer" is "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution * * * in relation to an account maintained in the person's name." 12 U.S.C. § 3401(5) (emphasis added). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4). Thus, the act is limited to individual customers and small partnerships; corporations are not protected. see, e.g., Pittsburgh National Bank v. United States, 771 F.2d 73 (3d Cir. 1985); Spa Flying Service, Inc. v. United States, 724 F.2d 95 (8th Cir. 1984)

(per curiam); see also Jerry T. O'Brien, Inc., 467 U.S. at 745 (RFPA "carefully limits the kinds of customers to whom it applies").

The government notes that the claimants are all corporations and therefore are not protected by the RFPA. It is unclear from the record on appeal whether the claimants are partnerships or corporations. If they are corporations, as they alleged in the district court, then they are not protected by the RFPA. If they are partnerships, as they now claim on appeal, we would need to remand so that the district court could obtain proof to that effect; however, a remand is not necessary, because there are alternate grounds that preclude the application of the RFPA.

Even if the claimants are in fact

small partnerships rather than corporations, the government contends that they still would not be protected by the RFPA, because they do not hold accounts in their names at the banks as required by 12 U.S.C. § 3401(5). The funds were not seized from accounts held in the various claimants' names, but were the proceeds of wire transfers that were designated to be credited to the accounts of Colombian banks maintained at the intermediary banks.

In response, claimants argue that once the EFTs were intercepted by the intermediary banks, the frozen funds were held by those banks under the claimants' names. At that point, claimants contend, they had "accounts" in their names at the banks. While claimants present a creative interpretation of an

"account", the seized funds were being held by the banks until the forfeiture trial at the request of the government, not the claimants. The RFPA is meant to protect those who maintain accounts in their names at financial institutions. Duncan, 813 F.2d at 1338 (definition of customer turns on "whether the individual maintains the financial account in his or her name only"); Ridgeley v. Merchants State Bank, 699 F. Supp. 100, 102 (N.D. Tex, 1988). Because the funds were being held in custody at the banks pursuant to an arrest warrant, we conclude that the claimants never maintained accounts in their names at the intermediary banks.

Finally, the government contends that even if there had been a statutory violation of the RFPA, exclusion of the

financial records from trial would not have been a permissible remedy. Because the RFPA states that civil penalties are "the only authorized" remedy for its violation, see 12 U.S.C. § 3417(d), it would be inappropriate for the courts to imply a suppression remedy as well. United States v. Frazin, 780 F.2d 1461, 1466 (9th Cir.) (only remedy under RFPA is provided in statute), cert. denied, 479 U.S. 844 (1986); see also United States v. Thompson, 936 F.2d 1249, 1252 (11th Cir. 1991) (courts should not imply a suppression remedy unless statute specifically refers to exclusionary rule), cert. denied, 112 S. Ct. 975 (1992).

In short on this point, because the RFPA does not protect the claimants, the Atlantico Claimants' counterclaim was

properly dismissed, and the financial records were properly admitted at trial.

5. Authorization for DEA Subpoenas.

The Barranquilla Claimants also claim that the financial records should have been suppressed at trial because the DEA did not follow proper administrative procedures for issuing the subpoenas. Specifically, they argue that John Maltz, whose rubberstamped signature is on the subpoenas, did not have the authority to issue the subpoenas, and that even if he did, he failed to personally determine whether the subpoenas were "relevant or material" to investigations conducted under the Comprehensive Drug Abuse Prevention and Control Act of 1970, as required by 21 U.S.C. § 876 (a). See United States v. Hossbach, 518 F. Supp. 759, 765-66 (E.D.

Pa. 1980).

Section 876 (a) authorizes the Attorney General to issue subpoenas for "relevant or material" information; the Attorney General may in turn delegate this subpoenas power to any DEA officer or employee. See 21 U.S.C. § 878(a)(2); see also United States v. Mountain States Tel. & Tel. Co., 516 F. Supp. 225, 229 n.2 (D. Wyo. 1981). The relevant federal regulation authorizes, among others, all Special Agents-in-Charge and Assistant Special Agents-in-Charge to issue subpoenas. 28 C.F.R. § 0.104, App. to Subpart R, Sec. 4(a).

Maltz was the Associate Special Agent-in-Charge of the New York Drug Enforcement Task Force, a position not specifically included in the regulation's list. The Barranquilla claimants

argue that any subpoena issued by Maltz was therefore unauthorized. As an Associate Special Agent-in-Charge, however, Maltz supervises nine Assistant Special Agents-in-Charge, agents who are specifically authorized to issue subpoenas under the regulation. During Maltz's eight years as an Associate Special Agent-in-Charge, internal New York Drug Enforcement Task Force procedures have required all administrative subpoenas to bear his signature. Since Maltz has the same authority as an Assistant Special Agent-in-Charge, plus additional supervisory responsibilities, we agree with Judge Weinstein that Maltz's exercise of the subpoenas power was proper. See Hossbach, 518 F. Supp. at 765-66 (upholding validity of subpoenas issued by either agents-in-charge or acting

agents-in-charge).

The Barranquilla Claimants further argue that Maltz never "issued" the subpoenas because they simply bear his rubber-stamped signature; nor is there any indication that Maltz personally determined that the information sought was "relevant or material" to an investigation. Judge Weinstein called the DEA's procedures in this respect "dangerous" and recommended that the government review its system for issuing DEA administrative subpoenas, but he denied the claimants' motion to suppress. We find no error in his ruling. Nothing in the statute, regulations, or caselaw requires a handwritten, rather than a rubber-stamped, signature on the subpoena. More significantly, even if the initial subpoenas were defective, the

financial records at issue would have been introduced at trial anyway, because they were procured through other means as well. Both the government and the claimants served the intermediary banks with deposition and trial subpoenas for the same documents.

6. Electronic Communications Privacy Act.

Claimants argue that the EFTs were protected under the Electronic Communications Privacy Act of 1986 ("ECPA"), which amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, often called the wiretap act. 18 U.S.C. §§ 2510-20. The ECPA updated the wiretap act to add prohibitions against the interception of "electronic communications" to the already existing prohibitions against interceptions of oral

and wire communications. See 18 U.S.C. § 2510(12). The Barranquilla Claimants maintain that the district court should have suppressed evidence of the EFTs since they were seized in violation of the ECPA. The Atlantico Claimants contend that the complaint should have been dismissed because the in rem warrants did not satisfy the ECPA, and that for the same reason the district court erred in dismissing their counterclaim under the ECPA.

First, we must determine whether the ECPA is applicable to this case. The statute is directed at regulating surveillance activities. However, the ECPA's legislative history indicates that congress intended to protect "funds transfers among financial institutions". S. Rep. No. 99-541, 99th Cong., 2d Sess.

8 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3562. There are no cases that apply the ECPA to an electronic funds transfer between banks or to a seizure of funds after the transfer is complete. For purposes of this appeal, however, we assume that the ECPA may apply to EFTs. Before considering the statute's applicability to these transfers, we first take up other issues raised by the district court.

Judge Weinstein addressed the ECPA at length in Consolidated Bank Cases, 792 F. Supp at 190-93, and briefly in All Funds, 801 F. Supp. at 995-96. Relying on the "relation-back" doctrine, see 18 U.S.C. § 981(b); 21 U.S.C. § 881(h), he held that the ECPA was inapplicable because "in forfeiture proceedings tainted property is considered

forfeited at the moment the illegal act is committed." All Funds, 801 F. Supp. at 995-96. Because ownership was transferred instantly at the moment of criminality, he found that the government "reasonably viewed the funds as its own" at the time of seizure. Id. at 996 (quoting Consolidated Bank Cases, 792 F. Supp. at 192).

However, since Judge Weinstein's decision, the Supreme Court has clarified the parameters of the relation-back doctrine in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993). There, the government initiated a civil forfeiture proceeding against land allegedly purchased with proceeds of illegal drug trafficking. The claimant, who had purchased the land with money her friend had given to her, maintained that

she was an innocent owner because she did not know the money was traceable to narcotics transactions. The district court held that, under the relation-back doctrine, title to the land vested in the government at the moment the illegal drug transaction proceeds were used to pay the purchase price. Therefore, because the claimant had purchased the land after the acts giving rise to the forfeiture had occurred, she had never owned the land.

The Supreme Court disagreed, holding that the government could not "profit from the common-law doctrine of relation-back until it has obtained a judgment of forfeiture." Id. at 1137. Otherwise, it would be impossible to launch an innocent-owner defense, which was specifically provided for at 21

U.S.C. § 881(a)(7). The relation-back doctrine is one of "retroactive vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation." Id. at 1138 (Scalia, J., concurring).

In light of Buena Vista, Judge Weinstein's application of the relation-back doctrine was incorrect. Because the government cannot contend that it owns the defendant properties until a judgment of forfeiture is entered against them, we must examine the ECPA's applicability to the EFTs.

The ECPA prohibits interceptions of electronic communications, see 18 U.S.C. § 2511(1), but no "device" was used to obtain the information as contemplated by the ECPA. The statute defines "intercept" as

> the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

18 U.S.C. § 2510(4) (emphasis added). Liability under the ECPA is therefore predicated on the use of a "device". See United States v. Turk, 526 F.2d 654, 658 (5th Cir.) (act requires "contemporaneous acquisition of the communication through the use of the device"), cert. denied, 429 U.S. 823 (1976). Because the government did not use any type of "device" to obtain the EFTs and information, no "interception" occurred.

The district court, therefore properly rejected all of the claimants' arguments under the ECPA.

7. Wire Transfer as a Res.

Claimants argue that EFTs are not seizable properties for purposes of the

civil forfeiture statutes because they are merely electronic communications. They claim that an EFT is not a direct transfer of funds, but rather a series of contractual obligations to pay. Furthermore, they define an EFT as "an intangible property, which not only cannot be stopped once transmitted, but the Intermediary Bank upon accepting it cannot alter from the instructions contained therein." Finally, they claim that only after a transmission is complete and the communication is accepted and received by the beneficiary does it become a seizable res.

Section 881 of Title 21 provides for the seizure of "moneys, negotiable instruments, securities, or other things of value * * * all proceeds traceable" to narcotics transactions. 21 U.S.C. §

881(6). Similarly, 18 U.S.C. § 981(a)(1)(A) provides for the seizure of "any property, real or personal, involved in a transaction or attempted transaction * * * or any property traceable to such property."

The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case.

With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

Our decision in United States v. Banco Cafetero Panama made it cleat that a bank credit is a seizable res. 797 F.2d 1154, 1158 (2d Cir. 1986) (bank credit is "clearly 'traceable proceeds' under the forfeiture statute") (Banco Cafetero). We also held that moving

"traceable proceeds" from bank to bank would not insulate them from forfeiture. "Since commingled assets, traceable to drug proceeds, are forfeitable, the bank's money remains vulnerable to forfeiture when the money is moved into its account at a second bank or into a second bank's account at a third bank." Id. at 1161; see also Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act of 1978, Pub. L. No. 95-633, reprinted in 1978 U.S.C.C.A.N. 9518, 9522 ("proceeds * * * involved in intervening legitimate transactions, or otherwise changed in form * * * still * * * subject to forfeiture" as long as "traceable connection to an illegal transaction in controlled substances exist[s]").

Therefore, an EFT while it takes

the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes.

B. Probable Cause.

Unless a claimant challenges the validity of the seizure, as in a motion to suppress, the government is not called upon to demonstrate probable cause until trial of the forfeiture action, *see* *$37,780 in United States Currency*, 920 F.2d at 163 (applying *Banco Cafetero*, 797 F.2d at 1162), or perhaps on a summary judgment motion. Although the government succeeded in two pretrial probable-cause hearings, one before Magistrate Judge Chrein and one before Judge Weinstein, and in a full-blown jury trial, claimants still contend that the government failed to meet its burden of proving probable cause.

Both for seizures made under in rem warrants and for warrantless seizures under § 881, the government bears the initial burden of establishing probable cause for instituting the forfeiture proceeding, see 21 U.S.C. § 881(d) (incorporating customs procedures); 19 U.S.C. § 1615 (customs laws), that is, "probable cause to believe that the properties are the fruits of illegal drug activity". See United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road, 916 F.2d 808, 811-12 (2d Cir. 1990) (Whites Hill), cert. denied, 498 U.S. 1091 (1991).

Since 1986 our caselaw has consistently relied on Banco Cafetero for the proposition that, to establish probable cause, the government must have "reasonable grounds" to believe the property is

subject to forfeiture, and that these grounds must rise above the level of "mere suspicion". 797 F.2d at 1160. See, e.g., United States v. 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990) (Black Ledge Drive); Livonia Rd., 889 F.2d at 1267; United States v. One 1986 Mercedes Benz, 846 F.2d 2, 4 (2d Cir. 1988) (per curiam). However, we seem to have recently articulated apparently inconsistent formulations of how far above "mere suspicion" the probable-cause burden lies. While in United States v. $31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993) (citation omitted), we stated that the "government must have reasonable grounds to believe that 'a substantial connection exists between the money to be forfeited and the exchange of a controlled

substance'", in St. Nicholas Ave., 983 F.2d at 403, we said that "[t]here need not be a substantial connection between the drug activities and the property in question, but only a nexus between them." We therefore take this opportunity to resolve this apparent contradiction.

As authority for the "substantial connection" standard, the $31,990 in U.S. Currency decision quotes United States v. United States Currency in the Amount of $228,536.00, 895 F.2d 908, 916 (2d Cir.), cert. denied, 495 U.S. 958 (1990), which in turn relies on Banco Cafetero, 797 F.2d at 1160. However, Banco Cafetero does not state that a "substantial connection" must be shown, only that the government must have "probable cause to connect the property with

narcotics activity". 797 F.2d at 1160 (emphasis added).

Moreover, on several occasions we have specifically declined to adopt a "substantial connection" standard. See United States v. 38 Whalers Cove Drive, 954 F.2d 29, 33 (2d Cir.) (Whalers Cove), cert. denied, 113 S. Ct. 55 (199-2); Livonia Rd., 889 F.2d at 1269; United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 423 (2d Cir. 1977). Our decisions in $31,990 in U.S. Currency, 982 F.2d 851, and United States Currency in the Amount of $228,536.00, 895 F.2d 908, are the only second circuit cases to the contrary. Examining the facts of those two cases, we note that application of the lower "nexus" standard, rather than the "substantial connection" standard, would not have

affected their results.

In $31,990 in U.S. Currency, the government failed to establish probable cause to forfeit money seized from the trunk of a cab. 982 F.2d at 854-56. The claimant, who had been a cab fare they day before the seizure, said he had inadvertently left his money in the cab. The government's evidence consisted of the large amount of cash seized, the manner in which it was packaged, the cab driver's story regarding who owned the money, parallels between the cab's itinerary and that of a drug courier, and the cab driver's possession of half a gram of cocaine. Id. at 853-55. None of the people involved had ever been linked to any criminal activity. Not only did the government fail to show a "substantial connection" between the

claimant's property and narcotics, we held that the evidence demonstrated "no more than a suspicion" that the money was the proceeds of drug trafficking. Id. at 856. It goes without saying that evidence failing to amount to more than "mere suspicion" is incapable of establishing a "nexus".

In United States Currency in the Amount of $228,536.00, the evidence supporting probable cause included tape recordings of numerous conversations implicating the claimant in drug trafficking, tax records, and eyewitness testimony detailing the claimant's possession, processing, and sales of large amounts of cocaine. 895 F.2d at 911. Application of the "nexus" standard there would have had no effect, since the government's case satisfied the

higher "substantial connection" standard.

Under all these circumstances, we are satisfied that the weight of authority in the second circuit indicates that the government must demonstrate only a "nexus between the seized property and illegal drug activity, not a "substantial connection". See St. Nicholas Ave., 983 F.2d at 403; United States v. One 1987 Jeep, 972 F.2d 472, 476 (2d Cir. 1992); Whalers Cove, 954 F.2d at 33; United States v. One 1974 Cadillac, 575 F.2d 344, 345 (2d Cir. 1978) (per curiam); One 1974 Cadillac Eldorado Sedan, 548 F.2d at 423.

To show that nexus when the res is a bank account, the government must establish that there is probable cause to believe the funds represent proceeds

traceable to drug transactions, see St. Nicholas Ave., 983 F.2d at 403; it is not required to link the monies to any one particular transaction. See Livonia Rd., 889 F.2d at 1269 (citing Banco Cafetero, 797 F.2d at 1160). The government must establish "reasonable grounds", based on more than "mere suspicion", that the funds are subject to forfeiture. Banco Cafetero, 797 F.2d at 1160; Livonia Rd., 889 F.2d at 1267. Curiously, this standard of proof can be less stringent than the typical "prima facie proof". Banco Cafetero, 797 F.2d at 1160. A finding of probable cause may be based on hearsay, even hearsay from confidential informants, see Livonia Rd., 889 F.2d at 1267, or circumstantial evidence, see St. Nicholas Ave, 983 F.2d at 405, particularly in cases

involving bank accounts, money, or other fungible assets. See id. ("only proof demonstrating probable cause is likely to be circumstantial, revealing unexplained wealth in conjunction with evidence of drug trafficking").

Claimants argue that the evidence presented here was illegally seized and therefore provided an impermissible basis for a finding of probable cause. As discussed above, however, there is no basis for suppressing the evidence derived from the seizures under either the fourth amendment or federal statutes.

The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to

effect a forfeiture. Because the final probable-cause determination rests on information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result. At this point in the development of forfeiture law, any change in the balance of this unique procedural system must come either from the Supreme Court or from congress.

Claimants also assert that even if the evidence was properly admitted at trial, the government failed to demonstrate "reasonable grounds" for the forfeiture of their funds. Under 21 U.S.C. § 881, probable-cause determinations are

"made by the trial court's exercise of its judgment in light of all the circumstances." St. Nicholas Ave., 983 F.2d at 405. The government's case included bank records from around the world; documents seized by the Colombian National Police from Cali, Colombia; and testimony of former members of the Cali Cartel, numerous DEA agents, a Luxembourg police officer, a member of the Internal Revenue Service's criminal investigations division, a United States customs official, and a certified public accountant who reviewed the claimants' business records.

While the claimants argue that the government failed to submit evidence that the "sources" and "destinations" of the seized funds were connected to narcotics activities, the extensive evi

dence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking. Each one of the claimants was linked to Santacruz-Londono through the testimony of at least one witness. We hold that the district court properly determined that the government had met its burden of establishing probable cause for the forfeitures.

C. Shifting Evidentiary Burden.

After the government has established probable cause, the burden shifts to the claimant to "demonstrate by a preponderance of the evidence that the factual predicates necessary to show probable cause have not been met or to show claimant[']s lack of knowledge or consent to drug related activities."

St. Nicholas Ave., 983 F.2d at 403; see Black Ledge Drive, 897 F.2d at 102; Livonia Rd., 889 F.2d at 1267 ("claimant must prove either that the property was not used unlawfully * * * or that the illegal use was without the claimant's knowledge or consent"); Banco Cafetero, 797 F.2d at 1160 (claimant bears "ultimate burden"). if the res is a bank account, the claimant bears the burden of proving that the account does not contain proceeds traceable to drug transactions, but rather represents legitimate funds. St. Nicholas Ave., 983 F.2d at 403.

Not only does the burden shift to the claimant opposing forfeiture, but the claimant's burden is heavier than the government's. While the government, to establish a prima facie case for

forfeiture, need only demonstrate "reasonable grounds", the owner of the seized property must prove that the defendant property is legitimate "by a preponderance of the evidence", a more stringent standard. United States v. 303 W. 116th St., 901 F.2d 288, 291 (2d Cir. 1990).

Judge Weinstein observed that the structure of the civil forfeiture statutes is "inherently unfair to claimants". All Funds, 801 F. Supp. at 991. While we also might question the wisdom of forcing the owner of the seized property to prove the property is "innocent", rather than making the government prove the property id "guilty", the constitutionality of congress's allocation of the burdens of proof in forfeiture cases has been upheld. See Whites

Hill Road, 916 F.2d at 814. We therefore stress the need for courts to ensure that what little due process is provided for in the statutory scheme is preserved in practice. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal- Civil Law Distinction, 42 Hastings L. Rev. 1325 (1991) (urging attention to civil law due process implications of current forfeiture practices); See also United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those

statutes.").

As the jury's verdict indicates, Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. successfully proved that their monies were not connected to drug activity. In addition, the jury found that Confecciones Elizabeth was and innocent owner. The remaining claimants were unable to show by a preponderance of the evidence that their monies were legitimate. Given that "the evidence of drug tainting was overwhelming" and that the claimants presented "implausible stories" and "inconsistent positions", see All funds, 801 F. Supp. at 992, we find that the remaining eighteen amounts were properly forfeited.

D. Other District Court Rulings.

1. Sanctioning Counsel.

During discovery, the Barranquilla

claimants requested admissions from the government regarding numerous historical, social, and cultural aspects of Colombia. Because Chief Magistrate Judge Chrein questioned the relevance of these requests and felt they were frivolous, he directed both parties to brief the issue of appropriate sanctions for Barranquilla Claimants' Counsel after the trial. No sanctions were imposed during trial, and ultimately Judge Weinstein denied the government's post-trial motion for sanctions.

On appeal, the Barranquilla Claimants assert that their counsel was "chilled" during the trial by the threat of possible sanctions in violation of their due process rights. The record, however, reveals no evidence that counsel for the Barranquilla Claimants was

"chilled" in any way. In the absence of prejudice to the Barranquilla Claimants from Chief Magistrate Judge Chrein's actions, we find no violation of their due process rights.

2. Permitting Expert-Witness Testimony.

The Barranquilla Claimants claim that they were prejudiced by DEA Agent Michaelis's testimony on the subject of money laundering, because it constituted surprise expert testimony. Michaelis was listed on the government's witness list prior to trial, but not as an expert. When Michaelis took the stand, Judge Weinstein qualified him as an expert and allowed him to testify about Santacruz-Londono's overall money-laundering scheme and techniques. The Barranquilla Claimants argue that they

were "substantially prejudiced" by this unexpected expert testimony.

Under the Federal Rules of Evidence, expert Witnesses may testify if their "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Qualified DEA agents who testify as fact witnesses may also give expert opinion testimony about the methods of drug operations. See United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 498 U.S. 866 (1990); United States v. Diaz, 878 F.2d 608, 617 (2d Cir.), cert. denied. 493 U.S. 993 (1989). A decision to allow expert testimony is within the broad discretion of the trial judge and "is to be sustained on appeal unless manifestly erroneous." United

States v. Brown, 776 F.2d 397, 400 (2d Cir. 1985), cert. denied, 475 U.S. 1141 (1986) (citation omitted). Furthermore, a district court's decision to permit a witness who was not listed in the pre-trial order to testify will be upheld absent a clear abuse of discretion. Dunlap- McCuller v. Riese Org., 980 F.2d 153, 158 (2d Cir. 1992).

A district court judge must frequently make close discretionary calls regarding the admission of evidence in civil forfeiture proceedings. Indeed, the Supreme Court has recently signalled its willingness, at least with respect to expert testimony, to require more active supervision by the district court. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2796-98 (1993). Because in civil for

feiture proceedings the government is far more favored by the rules than in virtually any other type of judicial proceeding, we think district judges, when making evidentiary decisions in these cases, should be mindful of the heavy burden placed on claimants.

Agent Michaelis's testimony included an account of his investigation of Santacruz-Londono and his associates, as well as opinions about their money-laundering activities. Judge Weinstein's determination that his testimony would help the jury was neither "manifestly erroneous" nor a "clear abuse of discretion". Especially in light of the jury instructions explaining that the government had not given Michaelis's expert testimony in writing to opposing counsel when they should have, and that an

expert's opinion should not be substituted for the jury's own conclusions, we conclude that the claimants were not prejudiced by Agent Michaelis's testimony.

3. Denial of Motion for Judgement Notwithstanding the Verdict.

At the end of the trial, Judge Weinstein denied the Atlantico Claimant's motion for a judgement notwithstanding the verdict. See Fed. R. Civ. P. 50(b). On appeal, the Atlantico Claimant's contend that the district court erred in denying their motion, because the government presented no evidence connecting their funds with narcotics activity.

We review the district court's decision on a motion for judgement notwithstanding the verdict de novo. Song

v. Ives Laboratories, 957 F.2d 1041, 1046 (2d Cir. 1992). Therefore, we can disturb the jury's verdict only if we can say, "without considering either the credibility of witnesses or the weight their testimony deserves, that the only conclusion a reasonable factfinder could have reached" is one favoring the Atlantico Claimants. Enercomp, Inc. v. McCorhill Publishing, Inc., 873 F.2d 536, 541 (2d Cir. 1989). In other words, there must be "`such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or * * * such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.'" Song, 957 F.2d at 1046.

Given the overwhelming evidence linking the Atlantico Claimants to drug trafficking and money laundering, the district court properly denied their motion for judgement notwithstanding the verdict.

D. Internal Revenue Service Levy.

On July 29, 1992, the IRS served a notice of Levy on the clerk of the United States District Court for the Southern District of New York to surrender the funds that were about to be released to Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. The IRS asserted that these two claimants were "nominees or alter egos" of Johnny Daccarett, a delinquent taxpayer who owed the IRS in excess of $3 million. Because Judge Weinstein's judgment, dated August 5, 1992, directed the clerk to issue a

check for those funds to counsel for the Atlantico Claimants, the clerk requested clarification from the court. At that point the government moved to amend the judgement to direct the clerk to honor the IRS levy. Instead of amending the judgement, Judge Weinstein simply entered an order authorizing the clerk of the court to comply with the levy -- which he did, on September 9, 1992.

Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. claim that Judge Weinstein erred in permitting execution of the IRS levy because (1) the government failed to show that it was issued in accordance with 26 U.S.C. § 7429(a); (2) the Anti-Injunctive Act prevents it, 26 U.S.C. § 7421; (3) Johnny Daccarett has no proprietary interest in their businesses; and (4) the government was

circumventing the federal interpleader statute and the Federal Rules of Civil Procedure.

In response, the government argues that the only grounds for noncompliance with an IRS levy are that (1) the entity served with the levy is neither "in possession of" nor "obligated with respect to" the requested property, or (2) the taxpayer's property is "subject to an attachment or execution under any judicial process." 26 U.S.C. § 6332. Since the validity of the levy and competing claims to the ownership of the funds are not valid reasons for refusing to honor a levy, the court properly directed the clerk to honor the IRS's levy.

If Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. want to pursue their challenge the IRS claim, they must

bring a separate wrongful levy action. 26 U.S.C. § 7426.

## CONCLUSION

As the use of civil forfeiture against the proceeds of narcotics trafficking increases, it is important to remember that the pertinent statutes are not legislated exceptions to the fourth amendment. Given the relative ease with which the statutory scheme allows the government to seize suspect properties, it is imperative for courts to analyze carefully the forfeiture process in light of the fifth amendment's due process demands and the fourth amendment's probable-cause and warrant requirements. Having done so in this case, we conclude that the government carefully complied with both its statutory and constitutional obligations.

Affirmed.

# APPENDIX C

*UNITED STATES COURT OF APPEALS*
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of October, one thousand nine hundred and ninety-three.

Present: HON. JAMES L. OAKES,
HON. LAWRENCE W. PIERCE,
HON. GEORGE C. PRATT,

Circuit Judges.

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Counter-Defendant-Appellee,

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPERESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

Claimants,

MERRILL LYNCH BANK, Certain funds contained in Account No.

04400080496170011443 3 held at The MERRILL LYNCH BANK 1 Columbus ; PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF NEW YORK IN THE NAMES OF SIRACUSA TRADING CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO OCAMPO; ANA MILENA SANTACRUZ; RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA.; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTD.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC., BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTENA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLUMBIANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

Defendants,

ABUCHAIBE HNOS. LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON LIMITADA; MANUFACTURAS DE MODAS LTDA; INCOLO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

Defendants-Appellants.

EMPERESA NELSON GOMEZ,
O. "FASTER" and COSTAFAST,

Counter-claimants.

---

Petitions for rehearing having been filed herein by Defendants-Appellants, Abuchaibe Hnos. Ltda, Manufacturas Internacionales Ltda, Organizacion J.D. Ltda, Manufacturas JD Ltda, Comercial Samora Ltda, Creaciones Viviana Ltda, Comercial Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Manufacturera del Atlantico Ltda, Industrias Marathon Limitada, Manufacturas de Modas Ltda, Incolco Ltda, Creaciones Karen, Tote Export Manufacturas Ltda, Creaciones Ivonne, Confecciones Zuny and Valery Fashions,

Upon consideration by the panel thereof, it is

Ordered that said petitions be and it hereby are DENIED.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk

By:

/s/ Carolyn Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

# APPENDIX D

ld

Reported at: 792 F. Supp. 180
(E.D.N.Y., 1992)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MANUFACTURAS INTERNACIONAL LTDA,

Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,

Defendant.

MEMORANDUM AND ORDER
cv-91-4536
(JBW)

ABUCHAIBE HNOS. LTDA,

Plaintiff,

- against -

BANCO ATLANTICO S.A.,

Defendant.

COMERCIAL SAMORA,

Plaintiff,

- against -

BANCO ATLANTICO S.A.,

Defendant.

CREACIONES VIVIANA,

Plaintiff,

- against -

BANCO ATLANTICO S.A.,

Defendant.

CONSOLIDATED BANK CASES

NELSON GOMEZ-COSTAFAST, and
NELSON GOMEZ- FASTER,
Plaintiffs,

- against -

BANK OF NEW YORK,
Defendant.

CREACIONES VIVIANA, LTDA,
Plaintiff,

- against -

BANCO ATLANTICO S.A.,
Defendant.

COMERCIAL ESTRELLA LTDA,
Plaintiff,

- against -

BANK OF NEW YORK,
Defendant.

CONFECCIONES Y TEJIDOS
NACIONALES LTDA,
Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,
Defendant.

MANUFACTURERA DEL ATLANTICO LTDA,

Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,

Defendant.

INDUSTRIAS MARATHON LTDA,

Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,

Defendant.

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WEINSTEIN, J.:

In ancient times, the dagger used to stab a person to death was forfeited to the Crown -- a practice having both legal and religious significance. 2 Sir Frederick Pollock & Frederic W. Maitland, The History of English Law 473-74 (2d Ed. 1968); Exodus 21 21:29. Recently this concept of the deodand has been extended to permit the government to seize the profits of narcotics traffickers. See 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). Expanding an archaic concept from a simpler society to fit our complex technology creates the interesting legal tensions reflected in these proceedings. Yet, the essential ancient and modern theory that

forfeiture occurs simultaneously with the tainting of the object by the crime applies and requires dismissal of these Bank Cases. See 18 U.S.C. § 981(b); 21 U.S.C. § 881(h).

Modern forfeiture cases continue to reflect the legal fiction that is the property which has committed a wrong. United States v. One Mercedes-Benz 380 SEL VIN # WDBCA 33A1BB10331, 604 F. Supp. 1307, 1312 (S.D.N.Y. 1984) ("the vehicle itself is guilty of facilitating crime"), aff'd, 762 F.2d 991 (2d Cir. 1985). As in the distant past, the accused instrument is instantaneously the property of the government when it becomes tainted with the heinous crime -- here, drug trafficking. 21 U.S.C. § 811(h) (1988 & Supp. III 1991) ("All right, title, and interest in property

[seized . . . shall vest in the United States upon commission of the act giving rise to forfeiture under this section."); see cases cited infra Part III. The government, as putative owner of allegedly guilty funds, is entitled to take appropriate steps to locate the property and take it into custody. Cf. 21 U.S.C. § 881(c) (1988 & Supp. III 1991) ("Property taken or detained . . . shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof.").

As part of a suspected drug money-laundering operation, large amounts of funds were being electronically transferred from Europe to South America via New York banks. The banks

cooperated with government requests, subpoenas, and court orders by stopping transmission and turning the funds over to the court. The claimants to the funds -- primarily Colombian business concerns -- sue the banks in these Bank Cases for loss of the use of their funds and other claimed violations.

The banks move to dismiss. Their argument is elementary and correct: those who assist the government are not liable to those who claim ownership of what the government contends is already forfeited by the taint of drug trafficking. Faced with competing claims to the same funds, the banks followed instructions and took the sensible step of paying the moneys into court in a form of interpleader. Even if after adjudication it is determined

that the funds are not tainted, no fault can be attributed to the banks.

I. FACTS

The electronic funds transfers at issue were seized based on complaints in United States v. All Funds on Deposit at Merrill Lynch, Pierce Fenner & Smith, Inc., CV 90-2510 (All Funds). These funds are alleged by the government to be the proceeds of illegal narcotics transactions forfeited under 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). The instant parallel private actions against Manufacturers Hanover Trust, Banco Atlantico, and the Bank of New York are consolidated as the Bank Cases.

The first government document to

mention these plaintiffs was the Third Amended All Funds Complaint filed July 18, 1990, with its accompanying Supplemental Warrant for Arrest of Articles in Rem issued pursuant to Rule C(3) of the Supplementary Rules for Certain Admiralty and Maritime Claims. An individual named Jose Santacruz-Londono and others working with him had allegedly "conducted extensive narcotics trafficking and money laundering enterprises, involving millions of dollars and multi-kilograms of cocaine smuggled into the United States and distributed, in part, in the New York metropolitan area."

Santacruz-Londono is said to hold a high position in the Cali drug cartel of Colombia. In 1985, he was indicted in the Eastern District of New York for

conspiring to distribute cocaine, distributing cocaine, and operating a continuing criminal enterprise. He is a fugitive.

The complaint alleged that in connection with Santacruz-Londono's narcotics trade, substantial sums of money have been deposited in, withdrawn from, and transferred to and from accounts located in the United States, including the defendant accounts, and other accounts located in Europe, Panama, and Colombia.

During the month of June 1990, three individuals believed to be connected with the Santacruz-Londono organization had been observed meeting and depositing large sums in accounts at the following places and times:

| | |
|---|---|
| June 11 | Bologna, Italy |
| June 12 - 18 | Portofino, Italy; |

| | |
|---|---|
| | Luxembourg City; Brussels; Copenhagen |
| June 19 | Stockholm |
| June 20 | East Berlin and West Berlin |
| June 21 | Amsterdam |

On June 29, 1990, two of the alleged Londono compatriots were arrested on money-laundering charges. A flurry of wire transfer activity followed these arrests.

On July 12, 1990, the Eastern District of New York issued an International Letter Rogatory to the Federal Republic of Germany on information that Santacruz-Londono and others had imported and distributed cocaine in the United States and conspired to disguise the sources and ownership of the proceeds. The government claimed that the Santacruz-Londono organization was importing approximately 3,000 kilograms of cocaine

a month into the United States.

A district judge of this court signed the Letter Rogatory and subsequent arrest warrants. The banks which are defendants in these Bank Cases were instructed in the Supplemental Warrants for Arrest of Articles in Rem accompanying the Third through Seventh Amended Complaints filed July 18 through August 3, 1990 to attach all funds on deposit in the name of various named individuals and entities and "all related entities and individuals." The United States Attorney also requested by telephone that the banks inform him of all electronic funds transfers received for third-party beneficiaries, only some of whom were named.

From the third week of July through the month of August 1990, the banks

faxed copies of each transactions to the United States Attorney, who then instructed the banks whether the beneficiaries were "related entities or individuals" and whether the transfers should be attached. The same or the next day the bank would get official notification to seize. Each of the successive Amended Complaints in All Funds named more beneficiaries as their identities became know.

There are now twenty-three claimants in All Funds, ten of whom are plaintiffs in these Bank Cases. None of the plaintiffs in the Bank Cases maintained accounts at the defendant banks. Rather, the plaintiffs were customers of Colombian banks that maintained correspondent banking relationships with the defendant banks.

The defendant banks were intermediary banks between the European originating banks and the Colombian receiving banks.

To effect the wire transfers, the defendant banks were supposed to credit the Colombian banks' correspondent accounts. In turn, the Colombian banks were to advise the beneficiaries of the credits. Instead, the defendant banks complied with the requests of the United States Attorney and the instructions of the court and seized the funds on deposit and the wire transfers.

On July 24, 1990, a show cause order presented by the government why the funds should not be paid into court was not opposed by the claimants. The court on July 30, 1990 ordered the banks to pay all attached funds into court. The order also instructed that funds

submitted to the court should be accompanied by identifying information such as the beneficiary and the ordering party. During August 1990, the banks complied, and seized funds were transmitted to the Clerk of the Court of this district. The funds are being maintained in an interest-bearing account pending the outcome of the All Funds trial set to begin on March 9, 1992.

On March 26, 1991, the All Funds claimants moved for summary judgment and to dismiss the government's complaint on the ground that the government lacked probable cause to seize the funds, that wire transfers are not a res, and that the funds were seized without a warrant. On April 12, 1991, this court denied the motions to dismiss and for summary

judgment. The case was remanded to a Magistrate Judge for a decision on whether there was probable cause to seize the funds as proceeds of narcotics trafficking and money-laundering. A supplemental hearing before the court was to be scheduled in the event that the Magistrate Judge found probable cause.

After a hearing, the Magistrate Judge found that the government had probable cause to seize the funds. On May 28 and 29 and June 6, 1991, a district judge also held a hearing on the probable cause issue. On June 13, 1991 this court issued an order finding that, based on the documentary evidence and the testimony of witnesses and experts, probable cause existed to believe that all the funds seized by the

government and the subject of the verified claims are subject to forfeiture, except one Merrill Lynch account in the name of Jaime and Cecilia Vargas in the amount of $8,542.35. That small amount was released. The subject funds of the June 13 order were those on deposit in certain identified accounts and the wire transfers at issue in these Bank Cases.

The Bank Cases were then pending in the district court for the Southern District of New York. On October 30, 1991, that court transferred the consolidated Bank Cases to the Eastern District of New York on the grounds that the cases were legally and factually related to United States v. All Funds. See 28 U.S.C. § 1404(a) (1988). In the Bank Cases, plaintiffs argue that the

banks violated several federal statutes by seizing the funds: the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq., the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 et seq. (as amended by the Electronic Communications Privacy Act of 1986), the Federal Reserve Act, 12 U.S.C. § 464 et seq., and the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq. In addition, plaintiffs have several state law claims based on the right to privacy, article 4-A of the Uniform Commercial Code, conversion, breach of a third-party contract, and gross and ordinary negligence. None of these federal or state claims has merit.

II. FORFEITURE PROCEEDINGS

Under the forfeiture statutes, 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991), the government may seize any funds and objects of value furnished or intended to be furnished in exchange for a controlled substance. In addition, the government may seek forfeiture of all objects or funds traceable to or intended to facilitate such exchanges. Congress intended that forfeiture be "a powerful weapon in the war on drugs." United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

No procedural rules specifically apply to forfeiture actions. Instead, the government applies rules borrowed

from the customs laws and from admiralty and maritime law. One court has suggested that the application of these rules to forfeiture actions has created "a procedural morass--a morass in which the parties . . . bec[o]me hopelessly entangled." United States v. $38,000 in United States Currency, 816 F.2d 1538, 1540 (11th Cir. 1987). See generally George C. Pratt & William B. Petersen, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653 (1991). This is somewhat of an exaggeration. Judicious use of available procedures and substantive law has permitted the courts to protect the rights of all concerned.

The present case combines the civil forfeiture laws with another area of law which has evolved with little

regulation: the law of electronic funds transfers. Although electronic funds transfers account for the movement of hundreds of trillions of dollars, few regulations govern the field. See generally Rainer Stockmann, Liability of Intermediary and Beneficiary banks in Funds Transfer: A Comparative Study of American and German Law, 8 Int'l Tax & Bus. Law. 215, 217 (1991); Jeffrey S. Tallackson & Norma Vallejo, International Commercial Wire Transfers: The Lack of Standards, 11 N.C.J. Int'l L. & Com. Reg. 639, 639 n.1 (1986). As two commentators have noted:

> Despite [the] ubiquity [of such transactions] in domestic and in domestic and international banking as well as the susceptibility of such systems to error and fraud, wire transfer systems have evolved virtually immune from any legislative regulation of the parties' right and duties. No coherent body of law governs this

area.

Id. at 639-40.

To understand the facts of this case, some background in the mechanics of wire transfers is necessary. The following brief description of one kind of funds transfer system is borrowed from Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047, 1049 n.1 (2d Cir. 1979) (description reprinted from district court opinion, 464 F. Supp. 989, 992 n.5 (S.D.N.Y. 1979)).

## III. MECHANICS OF ELECTRONIC FUNDS TRANSFER

An electronic funds transfer begins with the sending bank. It normally receives a telex from the bank, individual, or corporate entity that is originating the transaction, instructing

the sending bank to send funds. The sending bank tests and verifies the telex before transmitting the request, with all the identifying information, from its local computer operator to a central computer network. The central computer for the transfer system stores the information and causes a sending message to be automatically printed at the sending bank.

The sending bank, having determined that payment is appropriate, returns the sending message to its local computer operator to reinsert the message into the computer and press a release key. When the central computer receives this message, it causes the simultaneous printing of a debit ticket at the sending bank and a credit ticket at the receiving bank. The central computer

creates a permanent record of the transaction and adjusts the accounts of the sending and receiving banks. These steps are almost instantaneous.

Once the receiving bank has received the credit ticket, the individual or corporate beneficiary of the transfer is notified and the funds are made available to the recipient -- generally the same day. The funds transfer is considered completed at the moment the receiving bank receives the credit message, not when the beneficiary acquires the funds. See generally Richard M. Gottlieb, Payment, Settlement, and Finality, in UCC Article 4-A. A Practical Guide for Bankers and Bank Counsel (Am. Bankers Ass'n 1991) [hereinafter Bankers Guide].

The receiving bank may be acting as

an intermediary bank for a third bank, such as an overseas correspondent bank. If so, another transaction is necessary between the intermediary bank and the correspondent bank. Once the intermediary bank receives the funds, it should credit the account of the correspondent bank. In the instant case the sending banks are in Europe, the intermediary banks are in New York, and the correspondent banks are in Colombia. The funds transfers were seized at the intermediary banks before the funds were credited to the Colombian correspondent banks.

As already indicated, acting on its own investigation, the United States Attorney notified the defendant intermediary banks by telephone that certain electronic funds transfers would

be credited to those banks from sending banks. The intermediary banks examined all incoming wire transfers for their correspondent banks in Colombia, notifying the United States Attorney of all transfers designated for the identified beneficiaries. In addition, the banks notified the United States Attorney of other wire transfers to third-party beneficiaries, awaiting notification whether those funds were intended for "related individuals and entities" and should also be seized. Upon instruction from the United States Attorney, the intermediary banks seized the funds and turned them over to the Clerk of the Court for this district.

In the context of a forfeiture proceeding, the plaintiffs have no cause of action against the banks. The

property is considered forfeited at the moment the illegal act is committed. 18 U.S.C. § 981(b) (1988 & Supp. III 1991); 21 U.S.C. § 881(h) (1988 & Supp. III 1991). "[T]itle vests absolutely in the sovereign at the date of the illegal act." United States v. 1314 Whiterock & Improvements, San Antonio, Bexar County, Texas, 571 F. Supp. 723, 725 (W.D. Tex. 1983); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, ___, 109 S. Ct. 2646, 2653 (1989) (vesting at time of illegal act under "taint theory)); United States v. Trotter, 912 F.2d 964, 966 & n.2 (8th Cir. 1990) (since government's title in forfeited property relates back to commission of crime, district court could not require fine assessed against defendant to be paid from seized funds); United States v.

Walker, 900 F.2d 1201, 1204-05 (8th Cir. 1990) (forfeiture occurs at time of illegal act even though property may not be seized until later); In re Metmor Fin., Inc., 819 F.2d 446, 449-50 (4th Cir. 1987) (since at moment of criminal act original owner no longer owns the property, it is only innocent lienholder who may accrue interest); United States v. P.O. Box 1303, R.R. No. 2, Pekin Ill., 734 F. Supp. 841, 842 (C.D. Ill. 1990) (upon commission of crime United States succeeded to interest which non-innocent owners held as contract buyers, where innocent owners held fee simple subject to a contract for purchase); United States v. 2511 E. Fairmont Ave., Baltimore, Md., 722 F. Supp. 1273, 1279 (D. Md. 1989) (since under "relation-back doctrine" of section 881(h) title

had vested in the government at time of illegal act, parents could not succeed as heirs or donees of property from their son); United States v. One Piece of Real Property Located on Trafalgar Street in City of Aiken, S.C., 700 F. Supp. 857, 860-61 (D.S.C. 1988) (date on government's title relates back to date of crime), aff'd, 895 F.2d 987 (4th Cir. 1990); United States v. Real Property Titled in the Name of Shashin, Ltd, 680 F. Supp 332, 335-37 (D. Haw. 1987) (describing various court's treatment of post-seizure interest); United States v. Rod & Reel Fish Camp, 660 F. Supp. 483, 487 (S.D. Miss.) (since forfeiture occurs as of time of criminal act, third parties cannot acquire legal interest in property after that date), dismissed, 822 F.2d 57 (5th Cir.), remanded, 831

F.2d 566 (5th Cir. 1987); United States v. One Condominium Apartment, 636 F. Supp. 457, 458 (S.D. Fla. 1986) (since title vests in the United States at time of crime, innocent claimants only entitled to their principal and accrued interest up to time of seizure).

More precisely, the forfeiture, which relates back to the time of commission of the illegal act, is then " 'consummated' by a judgment or decree of a court." Western Pac. Fisheries v. SS President Grant, 730 F.2d 1280, 1287 (9th Cir. 1984) (dicta); see United States v. 1314 Whiterock & Improvements, San Antonio, Bexar County, Texas, 571 F. Supp. 723, 725 (W.D. Tex 1983) ("Seizure and subsequent judicial decree of forfeiture merely confirm the forfeiture that has already taken place."); United

States v. South 23.19 Acres of Land, 694 F. Supp. 1252, 1254 (E.D. La. 1988) (purpose of forfeiture proceeding is "only to perfect th[e] title" as between the government, which succeeded to a one-half interest when husband committed crime, and the wife, who was innocent and owned other half in community property state). But see United States v. Property Titled in the Name of Alexander Morio Toki & Elizabeth Mila Toki, ___ F. Supp.___, 1991 WL 255359 (Oct. 11, 1991) (where property held in tenancy by the entirety, at moment of crime innocent wife should succeed to entire property and thus the government succeeds to nothing but is in a position analogous to that of an unsecured judgment creditor of the non-innocent owner spouse). The bank is in this

case, acting at the direction of the government, seized money which the government considered its own because of the taint of narcotics trafficking.

## IV. FEDERAL STATUTORY CLAIMS

### A. RIGHT TO FINANCIAL PRIVACY ACT

The Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. (1988) [RFPA], is designed to protect the confidentiality of financial records from government intrusion. Section 3403(a) provides:

> No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.

12 U.S.C. § 3403(a) (1988 & Supp. III

1991). Only where the customer has given authorization or where the financial institution takes action pursuant to an administrative or judicial subpoena, a search warrant, or certain other enumerated categories of formal requests may the government authorities obtain access to or acquire copies of the records. Id. §§ 3402, 3413, 3414.

The RFPA functions as an "express limitation on the authority of government agencies to acquire records of an individual's financial transactions." Clayton Brokerage Co. v. Clement, 87 F.R.D. 569, 570 (D. Md. 1980). The Act was designed to balance two competing interests: "[the] customers' right of privacy and the need of law enforcement agencies to obtain

financial records pursuant to legitimate investigations." Id. at 570-71 (citing 1978 U.S. Code Cong. & Adm. News 9273, 9305).

The Right to Financial Privacy Act does not apply here because the complainants are not "customers" within the meaning of the statute. Section 3401 defines a customer as

> any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name . . . .

12 U.S.C. § 3401(5) (1988 & Supp. III 1991). The plaintiffs, as beneficiaries of wire transfers, were arguably "utilizing a [] service of a financial institution." They did not, however, maintain accounts in their own names at

the defendant banks.

Plaintiffs' position is that the RFPA requires that a person have an "account maintained in [his] own name" only when the bank is acting as his fiduciary, but not when the person is utilizing a service of the financial institution. This argument is not persuasive. The commas surrounding the phrase beginning with "or" and ending with "fiduciary" reasonably suggest that a customer must have an account in his own name in both situations. See Ridgeley v. Merchants State Bank, 699 F. Supp. 100, 102 (N.D. Tex. 1988) ("the Act protects individuals in whose name the financial account is held") (emphasis omitted); Duncan v. Belcher, 813 F.2d 1335, 1338-39 (4th Cir. 1987) (same).

The RFPA "carefully limits the kinds of customers to whom it applies, and the types of records they may seek to protect." Securities & Exch. Comm'n v. Jerry T. Obrien, Inc., 467 U.S. 735, 745 (1984) (citations omitted); see Spa Flying Serv., Inc. v. United States, 724 F.2d 95, 96 (8th Cir. 1984) (corporation is not a customer since it is not enumerated in definition of "person" in the Act); Pittsburgh Nat'l Bank v. United States, 771 F.2d 73, 76 (3rd Cir. 1985) (same). Since the beneficiaries did not maintain accounts in their own names, they are not customers within the meaning of the statute even though they arguably "utilized a[] service" of the bank.

Because the Act does not apply, we need not decide whether seizure of funds

constitutes the transfer to the government of "information" or "financial records." Cf. United States v. Eighty-Eight (88) Designated Accounts Containing Monies Traceable to Exchs. for Controlled Substances, 740 F. Supp. 842, 851 & n.15 (S.D. Fla. 1990) (court in seizure case concerned about government's "apparent violation of the RFPA"). Nor is it necessary to decide whether the litigation exception could apply in an in rem proceeding nominally one by the government against the funds -- that is, whether the beneficiaries of wire transfers can be considered "parties." See 12 U.S.C. § 3413(e) (1988 & Supp. III 1991).

B. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Plaintiffs also claim that the

banks, in seizing the wire transfers of funds, violated the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 et seq. (1988 & Supp. III 1991). That statute was amended in 1986 by the Electronic Communications Privacy Act [ECPA], which was passed on October 21, 1986 and became effective 90 days later. Congress broadened the prior reach of the statute to cover many new developments in technology. The legislative history points out that the amendment is designed to

> Update and clarify Federal privacy protections and standards inlight of dramatic changes in new computer and telecommunications technologies.

1986 U.S. Code Cong. & Admin. News 3555, 3555. Before amendment the Act prohibited only the "aural" interception of wire and oral communications and

protected only those wire communications sent by common carriers. The impetus for amendment was the need to protect privacy while keeping pace with modern technology, but the amendment may have reduced privacy protection. See generally Russell S. Burnside, The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies, 13 Rutgers Computer & Tech. L.J. 451, 494-95 (1987) (1986 Act cured "ambiguities and antiquities of the 1968 Act . . . [but] at the expense of privacy protections"); Fred Jay Meyer, Don't Touch That Dial: Radio Listening Under the Electronic Communications Privacy Act of 1986, 63 N.Y.U. L. Rev. 416, 434 (1988) (arguing

that although the 1986 bill was intended to curb increasing surveillance, it "came to embody the Justice Department's wish list" with concomitant reduced privacy protections); L. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontiers, Keynote Address at the First Conference on Computers, Freedom and Privacy (proposing Constitutional amendment to address conjunction of privacy and technology), cited in Robert Garcia, "Garbage In, Gospel Out": Criminal Discovery, Computer Reliability, and the Constitution, 38 UCLA L. Rev. 1043 (1991).

The statute as amended now prohibits the interception of "electronic communications" as well as oral and wire communications. It

applies to a wide range of new technologies, including electronic mail and bulletin boards, computer-to-computer communications, remote computer services, cellular telephones, portions of cordless telephone communications, pen registers, trap and trace devices, and certain kinds of pagers and satellite transmission. 1986 U.S. Code Cong. & Admin. News 3555, 3562-65. As pointed out in the legislative history:

> Today we have large-scale electronic mail operations, computer-to-computer data transmission, cellular and cordless telephones, paging devices, and video teleconferencing. A phone call can be carried by wire, by microwave or fiber optics. It can be transmitted in the form of digitized voice, data or video.

Id. at 3556 (citation omitted). An electronic communication is defined as

> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature

> transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . . .

18 U.S.C. § 2510(12) (1988 & Supp. III 1991). It includes digital and scrambled symbols. Id. § 2510(16)(A). Bank-to-bank funds transfers and transmission of financial records were intended to be protected electronic communications under the amended statute. See 1986 U.S. Code Cong. & Admin. News 3555, 3562.

Further technological advancements will raise new problems. For example, whereas in earlier days eavesdroppers needed to tap the lines of a computer directly, now they can intercept the electromagnetic radiation emitted by computers and their peripherals, either actively from cables or passively as the radiation moves through the ether. See

Christopher J. Seline, Eavesdropping on the Compromising Emanations of Electronic Equipment: The Laws of England and the United States, 23 Case W. Res. J. Int'l L. 359, 360 & nn.8-9 (1991); see also Russell S. Burnside, The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies, 13 Rutgers Computer & Tech. L.J. 451, 497-98 (1987) (certain distinctions the 1986 statute makes among various electronic devices are already obsolescent). It has been suggested that in the twenty-first century specialized hardware and software, connected by wires, radio waves, and infrared, will be so ubiquitous that no one will remark their

presence. Mark Weiser, The Computer for the 21st Century, in Scientific American, at 93 (Sept. 1991). Such devices will keep track of individuals and objects, their location and function, without any awareness on the part of subjects that they are being monitored. Id.

That the statute was amended to keep pace with technological advancements does not change its purpose and scope. Usually known as the federal wiretap act, the statute was designed by Congress to create a uniform system to govern electronic surveillance. See 1968 U.S. Code Cong. & Admin. News 2112, 2153, Cited in United States v. Clemente, 482 F.Supp. 102, 106 (S.D.N.Y. 1979), aff'd, 633 F.2d 207 (2d Cir. 1980). The Act "represent[ed] an

attempt by Congress to establish a system of electronic surveillance subject to rigorous safeguards." Clemente, 482 F.Supp. at 106; see also United States v. Tortorello, 480 F.2d 764, 773 (2d Cir.) ("The Act represents an attempt by Congress to establish a limited system of electronic surveillance . . . ."), cert. denied, 414 U.S. 866 (1973).

The Eleventh Circuit in United States v. Herring, 933 F.2d 932 (11th Cir. 1991), in a case interpreting another section of the statute which describes prohibited devices, addressed the question whether the 1986 amendments "changed the nature of the statute." Id. at 934. At issue were the convictions of defendants in the district court for selling devices that

unscramble satellite pay-television transmissions. Noting that the 1986 amendments simply substituted "intentionally" for "wilfully" and added "or electronic" to the list of kinds of communications, the court concluded that the amendments effected no other change in the statute's scope. Id. at 934-35; see also Christopher J. Seline, Eavesdropping on the Compromising Emanations of Electronic Equipment: The Laws of England and the United States, 23 Case W. Res. J. Int'l L. 359, 375 (1991) ("[the 1986] Act did not modify the main concerns of Title III"). The statute continues to be directed at regulating surveillance through prohibiting the interception of the contents of communications by any electronic, mechanical, or other device.

18 U.S.C. § 2510(4) (1988 & Supp. III 1991).

The seizure of electronic funds transfers by banks following government and court instructions in forfeiture proceedings is not within the ambit of the wiretap statute. Forfeiture proceedings are not surveillance. In these Bank Cases, since the funds and the transfers were being claimed in good faith as belonging to the government, obtaining information on their destination and taking them into government possession was not a violation of the statute.

There is little doubt that the war on drugs, including the skirmishes around forfeitures, has reduced the law's privacy protections. See generally United States v. Glover, ___

F.2d ___, ___, 1992 WL 29046, at *16 (2d Cir. 1992) (Oakes, C.J., dissenting) ("One would hope that the war on drugs does not make for a police state . . . ."); United States v. Monsanto, 924 F.2d 1186, 1204 (2d Cir.) (Oakes, C.J. dissenting) (disagreeing with majority's decision in light of "the squeeze already exerted on prosecutorial and judicial resources by the flood of narcotics cases inundating the federal courts"), cert. denied, 112 S. Ct. 382 (1991); United States v. Riley, 906 F.2d 841, 850 (2d Cir. 1990) (Weinstein, J., dissenting) ("Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.") (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989)

(Marshall, J., dissenting)). Nevertheless, there is no warrant in the wiretapping or electronic eavesdropping provisions to protect those Omnibus Crime Control and Safe Streets Act as amended and the forfeiture statutes, Congress will have to act to provide further protection to claimants.

The wiretap act has no application because funds in forfeiture proceedings are deemed to belong to the government at the time of their criminal use. The statute cannot apply where, as here, the government reasonably viewed the funds as its own. The concept that ownership of the object is transferred instantaneously at the time of criminality provides a conceptual distinction making the laws governing wiretapping and interference with

communications irrelevant.

Even if the statute applied, the banks would not be subject to liability. As noted above, the 1986 amendments substituted "intentionally" for "willfully." Since the instant funds were already forfeited to the government as a result of their illegal genesis, the government's intent was to seize its own funds. The banks had no independent intention other than to follow the directions of the United States Attorney. The banks should face no liability where they intentionally acted within their perceived legal obligations by following the instructions of the United States Attorney and the court.

Moreover, under the statute there is no liability where a party to the transfer intercepts the communication by

consent or under color of law:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c) (1988 & Supp. III 1991). No cause of action may be maintained against private actors where they are ordered by government authorities to intercept communications. See Camacho v. Autoridad de Telefonos, 868 F.2d 482, 489-90 (1st Cir. 1989) (telephone companies entitled to immunity under that section when acting at the direction of federal officers). Nor is there liability for the interception of electronic communications in transit or in electronic storage where one party to the communication consented to access.

See American Computer Trust Leasing v. Jack Farell Implement Co., 763 F. Supp. 1473, 1494-95 (D. Mn. 1991). The banks, and not the beneficiaries, were parties to the communication and consented to the interception. They acted at the direction of the United States Attorney as to funds the government claimed as its own.

Another provision of the statute specifically exempts from liability the providers of an electronic communication service who act at the direction of a court order:

> Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications . . . if [the above enumerated persons have] been

> provided with--
>
> (A) a court order directing such assistance signed by the authorizing judge . . . .

18 U.S.C. § 2511(2) (a) (ii) (1988 & Supp. III 1991). The banks, as providers of an electronic communication service, are authorized under the statute to assist the law enforcement agents in the interception of communications.

Good faith reliance on a court warrant or order is also a complete defense under the statute. 18 U.S.C. § 2520(d) (1988 & Supp. III 1991); see also id. § 2707(d)(1) (same defense for interception of stored electronic communications). These Bank Cases are analogous to Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978), cert. denied, 442 U.S. 930 (1979), where a telephone company received a court order

requesting it to assist county officials with a wiretap. The telephone company asked the officials to redraft the order to ensure that no law was being violated. Similarly, in these Bank Cases, the banks received the complaints and warrants and they requested assistance from the United States Attorney to clarify the instructions. One bank employee declared: "we talked to [the United States Attorney] in order to have a clarification of the test of the subpoena."

The banks, like the telephone company in Rose, are protected because of their reasonable belief that they were acting in compliance with a lawfully issued court order. 592 F.2d at 523-24; see also Smith v. Nixon, 606 F.2d 1183, 1191 (D.C. Cir. 1979)

(telephone company's reasonable expectation of legality when acting pursuant to Executive direction prevented any liability for alleged Constitutional or statutory violation), cert. denied, 453 U.S. 912 (1981); Citron v. Citron, 539 F.Supp. 621 (S.D.N.Y. 1982), aff'd, 722 F.2d 14 (2d Cir. 1983) (same under wiretap statute before amendment), cert. denied, 466 U.S. 973 (1984); Wright v. State of Florida, 495 F.2d 1086, 1090 (5th Cir. 1974); (dicta) (good faith reliance on a court order is a defense under the Fourth Amendment and under the wiretap statute); cf. Kratz v. Kratz, 477 F. Supp. 463, 479-80 (E.D. Pa. 1979) (dicta) (reasonable reliance on an opinion of a United States Court of Appeals may be proper basis for good

faith defense).

It is unnecessary to address the defendants' remaining argument, that they could not have "intercepted" the electronic communications since they were in fact the intended recipients.

C. FEDERAL RESERVE ACT

Plaintiffs assert in a conclusory fashion that the seizure of funds violated Regulation J of the Federal Reserve Act, which "governs the collection of checks and other cash and noncash items by Federal Reserve Banks." 12 C.F.R. § 210 et seq. (1985). Regulation J was promulgated to "define more precisely the terms and conditions under which the Reserve banks receive and handle for collection [such] items." Colonial Cadillac, Inc. v. Shawmut Merchants Bank, N.A., 488 F. Supp. 283,

284 (D. Mass. 1980) (citing 32 C.F.R. § 6210). The provisions of Regulation J serve to "limit liability of a Federal Reserve bank." Appliance Buyers Credit Corp. v. Prospect Nat'l Bank, 505 F. Supp. 163, 164 (C.D. Ill. 1981) (depositor of a sending bank is not a "sender" as defined in 12 C.F.R. § 210.2(e)), aff'd, 708 F.2d 290 (7th Cir. 1983); see also Washington Petroleum & Supply Co. v. Girard Bank, 629 F. Supp. 1224, 1229-30 (M.D. Pa. 1983) (same); Childs v. Federal Reserve Bank, 719 F.2d 812, 814 (5th Cir. 1983) ("Regulation J . . . enables the federal reserve system to perform its check collection and clearinghouse functions . . . ."); Colonial Cadillac, 488 F. Supp. at 285 (remote parties protected). Plaintiffs have failed to prove that the Federal

Reserve Act has any application to the seizure of wire transfers by intermediary banks in forfeiture proceedings.

D. FOREIGN INTELLIGENCE SURVEILLANCE ACT

The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (1988), relied upon by the plaintiffs, has no bearing on this case. The government and banks were overseeing transfers of what the government considered its own funds.

V. STATE LAW CLAIMS

A. NEW YORK RIGHT TO PRIVACY

Plaintiffs claim that the banks' seizure of wire transfers violated their right to privacy. Whether viewed as a common law cause of action or a state

statutory cause of action, plaintiff's complaint fails to state a claim. There is no common law right to privacy in the State of New York. See Young v. United States Dep't of Justice, 882 F.2d 633, 641 (2d Cir. 1989), cert. denied, 493 U.S. 1072 (1990) (citing New York cases); Cohen v. Hallmark Cards, 45 N.Y. 2d 493, 497 n.2 (Ct. App. 1978). Although there is a statutory right to privacy, it is restricted to "cases involving unauthorized use of person's name or likeness." Young, 882 F.2d at 641 (citing N.Y. Civ. Rights Law §§ 50-51).

B. U.C.C. ARTICLE 4-A

Article 4-A of the Uniform Commercial Code was enacted in the State of New York with an effective date of January 1, 1991. Article 4-A for the

first time put into place specific rules for the regulation of funds transfers. It cannot be relied upon in the instant case since the wire transfers were seized in July and August of 1990. The statute does not apply retroactively. See Banque Worms v. BankAmerica Int'l, 568 N.Y.S. 2d 541, 547 (Ct. App. 1991).

In any event, section 4-A-503 of the U.C.C., entitled "Injunction or Restraining Order With Respect to Funds Transfer," recognizes that banks have an obligation to respond to court orders. See Thomas J. Greco, Miscellaneous Provisions: Creditor Process, Injunction, Finality of Account Statement, and Choice of Law, in Bankers Guide, supra, at 56. The Official Comment states that "intermediary banks are protected," meaning that since the

time in transit for funds transfers is brief, intermediary banks cannot be expected to comply with injunctions by creditor. Instead, creditor process should be directed at the originating and receiving banks. The Comment suggests that intermediary banks should not be exposed to liability under article 4-A for declining to stop funds transfers where creditors are seeking the funds. In the instant case, the opposite situation is presented. Plaintiffs wish to hold the intermediary banks liable for agreeing to seize the funds. No such liability is justified. Article 4-A was enacted to enable all parties to funds transfers to "predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer

services accordingly." Official Comment to U.C.C. § 4-A-102. The policies of article 4-A are served by protecting the intermediary banks in forfeiture cases. The courts should hesitate to provide restrictions on their own powers to act swiftly. Cf. Sir Nicolas Browne-Wilkinson, Territorial Jurisdiction and the New Technologies, 25 Israel L. Rev. 145, 147 (1991) ("[T]he speed at which modern technology works is . . . threatening the roots of justice itself."). Finally, even if the U.C.C. were applicable, under the Supremacy Clause a state could not in its regulation of commercial activity inhibit federal law enforcement agencies in applying federal drug laws.

C. CONVERSION

Plaintiffs allege a cause of action

for conversion against the defendant banks. Conversion requires the intentional deprivation of the property of another with intent to retain it permanently. See In re Di Crocco's Estate, 12 N.Y.S. 2d 276, 278 (Surr. Ct. 1939); see, e.g., Shawmut Worcester County Bank v. First Am. Bank & Trust, 731 F. Supp. 57, 59-60 (D. Mass. 1990) (conversion claim may be cognizable, but no conversion under the facts of the case, where bank refused to reverse wire funds transfer); cf. 1 W. Hawkland, F. Leary & R. Alderman, Conversion by Representatives Including Depositary and Collecting Banks, U.C.C. Series § 3-419:05 (1982-86).

No conversion by the banks took place. Although the banks did seize the wire transfers of funds, they promptly

paid the moneys to the Clerk of the Court for safekeeping during the pendency of the litigation. There was never an intention by the banks to take title for themselves or on behalf of anyone else. Cf. Bradley v. Roe, 282 N.Y. 525, 532 (Ct. App. 1940) ("placing property in the custody of the court is, it is plain, not an assertion of dominion over the property to the exclusion of the real owner"). In effect, there were two parties contending they owned the funds -- the government and the claimants. The banks turned the funds over to the courts in a kind of interpleader. In any event, no claim for conversion is possible in forfeiture proceedings, since the defendant property ceases to belong to the claimant at the moment the crime is

committed.

D. THIRD-PARTY BENEFICIARY

Where a contract is formed for the benefit of a third person, that person should have a right of action against a promisee who fails to perform. 2 Samuel Williston, A Treatise on the Law of Contracts § 347 et seq. (3d ed. 1959). Plaintiffs claim that as third-party beneficiaries of a contract between the banks, they have a cause of action against the banks that failed to turn over the funds.

Generally, it is the originator's and not the beneficiary's claims against an intermediary bank which are allowed to stand. See, e.g., Security Funds Servs. v. American Nat'l Bank & Trust Co., 542 F. Supp. 323, 329 (N.D. Ill. 1982) (initiator of transfer could be a

third-party beneficiary). But see Worldwide Sugar Co. v. Royal Bank, 609 F. Supp. 19, 25 (S.D.N.Y.) (no manifest intention to benefit third-party in letter-of-credit arrangement), aff'd, 751 F.2d 373 (2d Cir. 1984). The plaintiffs here have made no showing that they are not only the beneficiaries but also the originators of the wire transfers.

In a forfeiture proceeding, the claims of plaintiffs as beneficiaries of wire transfers are meaningless. As noted above, at the moment a crime is committed the property ceases to belong to the claimant. If it is determined at trial that the funds are traceable to narcotics trafficking, the money will be declared the property of the government ab initio. Then several defenses or

excuses would nullify or bar enforcement of the contract. For example, where the subject matter of a contract is illegal, there is no enforceable contract. Where performance is impossible, it is excused. Cf. United States v. Rod & Reel Fish Camp, 660 F. Supp. 483, 487 (S.D. Miss.) (third parties cannot acquire legal interest in property after date of illegal act since forfeiture occurs as of that time), dismissed, 822 F.2d 57 (5th Cir.), remanded, 813 F.2d 566 (5th Cir. 1987).

As of this moment, probable cause having been found for the seizure of the funds, the claim of the government, not of the plaintiffs, is the only one appropriate for recognition under the third-party contract rubric.

E. NEGLIGENCE CLAIMS

Like the other causes of action, plaintiffs' negligence and gross negligence causes of action stem from the seizure of wire transfers of funds by the defendant intermediary banks. Courts have upheld negligence actions against banks for failing to effectuate electronic funds transfers. See, e.g., Bradford Trust Co. v. Texas Am. Bank-Houston, 790 F.2d 407, 411 (5th Cir. 1986) (negligence claims may stand against bank which honored fund transfer requests of imposter); Compania Anonima Venezolana de Navegacion v. American Express Int'l Banking Corp., 1985 WL 1898, at *5 (S.D.N.Y. 1985) (denying summary judgment because of possible negligence of bank in failing to transmit telex); Security Funds Servs.

v. American Nat'l Bank & Trust Co., 542 F. Supp 323, 327 (N.D. Ill. 1982); Evra Corp. v. Swiss Bank Corp., 522 F. Supp. 820, 828-29 (N.D. Ill. 1981), aff'd in part, vacated in part, rev'd in part, 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982); Central Coordinates, Inc. v. Morgan Guar. Trust Co., 494 N.Y.S. 2d 602, 605 (N.Y. Sup. Ct. 1985) (negligence claim cognizable, but none found where it was the plaintiff who was in a better position to avoid the consequences of nondelivery of funds or failure to notify of transfer).

In negligence actions against the banks, as in the third-party contract actions discussed above, it is the originator of the funds transfer who is permitted to maintain the cause of

action. In Evra, for example, the district court held that the sending bank was under a duty to exercise ordinary care to ensure that the funds transfer was effected in a proper and timely manner. 522 F. Supp. at 829.

In the instant case, defendants were not rogue banks seizing funds carelessly or without justification. The intermediary banks were following the precise oral and written instructions of the United States Attorney and the court. Even if the banks can be considered to have a duty to the beneficiaries who were not their customers (a proposition not without controversy), they did not violate the duty of care.

The banks were directed in a showing of apparent authority to seize

the funds. Cf. Clayton Brokerage Co. v. Clement, 87 F.R.D. 569, 570 (D. Md. 1980) (dicta) (bank has no justification for refusing to comply with subpoena issued in civil action). They do not have all the relevant information and cannot make an independent determination of merit.

Moreover, wire transfers occur at such speed, see Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047, 1049 n.1 (2d Cir. 1979), that the banks could not, even if they wished, take the time to evaluate orders before deciding whether to comply. Courts recognize that, at least vis-a-vis government action, the nature of the property to be seized may justify swift action. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679

(1974); United States v. 4880 S.E. Dixie Highway, 612 F. Supp. 1492, 1498 (S.D. Fla. 1985) (government may "act first and seek judicial approval later" where movable nature of res suggests exigent circumstances). Where the property is "of a sort that could be removed to another jurisdiction, destroyed, or concealed," Calero-Toledo, 416 U.S. at 679, notice or delay would compromise the government's enforcement goals. Cf. Sir Nicolas Browne-Wilkinson, Territorial Jurisdiction and the New Technologies, 25 Israel L. Rev. 145, 149-52 (1991) (speed of electronic transfers has required the Chancery Court of the High Court in London to expand its jurisdiction over foreign funds).

Generally, it is only where a

residence is at stake that courts recognize the necessity of preliminary notice and hearing before seizure. See United States v. 4492 South Livonia Rd., Livonia, N.Y., 889 F.2d 1258, 1265 (2d Cir. 1989) (contrasting proceeding against home with proceeding against funds; in the latter, government may forgo pre-seizure hearing). But see United States v. 16 Clinton Street, N.Y., N.Y., 730 F. Supp. 1265, 1271-72 (S.D.N.Y. 1990) (seizure of building that contained stores in addition to apartments valid even without notice and hearing). See generally Jack Yoskowitz, The War on the Poor: Civil Forfeiture of Private and Public Housing, 1992 Colum. J.L. & Soc. Probs. (forthcoming). By contrast, electronic funds transfers occur almost instantaneously. The

government must be permitted to act swiftly. There is no time or warrant for any independent evaluation by the banks that would interfere with execution of national forfeiture policy. The claimants can and should look for protection in proceedings involving the government as they are now doing in the All Funds case.

The banks were acting as agents of the court and should be protected. Cf. K/S Norman Agather v. Sea Trade & Constr., Ltd., 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (bank was acting as agent of the court when it executed writ of attachment and as such should be protected); Camacho v. Autoridad de Telefonos, 868 F.2d 482, 489-90 (1st Cir. 1989) (semi-public telephone companies immune from liability where

following directives of federal agents). The ability of intermediary banks to rely on court orders without risk of liability is essential to the financial health of this industry. Jeffrey S. Tallackson & Norma Vallejo, International Commercial Wire Transfers: The Lack of Standards, 11 N.C. J. Int'l L. & Com. Reg. 639, 665 (1986).

VI. CONCLUSION

Plaintiffs have failed to state a claim under any state or federal theory. No liability can be found where the banks were in good faith following government orders respecting claimed government funds. There is not the slightest suggestion of bad faith by the banks. Summary judgment for the defendants is granted. The complaint is dismissed.

SO ORDERED.

/s/ Jack B. Weinstein
Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
February 27, 1992